

February 2022

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Recommended Citation

Myron Orfield & Will Stancil, *Neo-Segregation in Minnesota*, 40(1) LAW & INEQ. 1 (2022), DOI:
<https://doi.org/10.24926/25730037.638>.

Neo-Segregation in Minnesota

Myron Orfield† and Will Stancil

Introduction

If there were a single central contribution that Minnesota has made to American history, it would be its leadership in civil rights, particularly its efforts to advance racial integration in schools and housing. In no other field has the state had such a profound, positive impact on American law, culture, and politics. Minnesota leaders—Black and White, Republican and Democrat—were central to the development of the modern conception of racial civil rights and of an integrated, universal society. They pioneered far-sighted state laws and policies to achieve equality in schools and housing, inventing new ways of thinking about and using government and policy. Without those leaders and their intellectual and political labors, it is difficult to imagine that the core American civil rights laws—the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the Fair Housing Act of 1968—would have been passed in their modern form.

Even more impressive progress occurred at the state and local level, where Minnesota law overcame many of the barriers, legal and political, that had limited the reach of federal statutory rights. Minneapolis would be one of the first cities in the country to pass an enforceable Fair Employment Practices Commission and outlaw racial covenants.¹ In 1955, the state enacted a Fair Employment Practices law; in 1961, a state Fair Housing Act; and in 1967, a comprehensive civil rights law that folded previous legal protections into a powerful state Human Rights Act providing disparate impact causes of action for all forms of discrimination and administrative authority to outlaw *de facto* segregation.²

But if the North Star State had helped lead the United States towards a more just and integrated society, in recent years an equally varied collection of Minnesotans is helping undermine those

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1. CARL SOLBERG, HUBERT HUMPHREY 106 (1984).

2. *Id.*; ELMER L. ANDERSEN, A MAN'S REACH 210 (Lori Sturdevant ed., 2000); *Your Civil Rights*, MINN. DEPT OF HUM. RTS., <https://mn.gov/mdhr/yourrights/> [<https://perma.cc/X7MG-438X>].

historic accomplishments. Where a cross-partisan consensus once existed in favor of traditional civil rights, today a coterie of Minnesotan leaders are working together to promote ideas that attempt to circumnavigate the thorny issue of equal rights and integration. The leaders include members of both major parties, elected officials, businesspeople, community figureheads, and industry representatives. In a number of notable instances, these leaders have directly defended racial segregation, or even praised its benefits. The reforms being promoted by this group may seem new—even innovative—at first glance. But those reforms defend and perpetuate the very old, and deeply entrenched, system of racial segregation. These are Minnesota's neo-segregationists.

Neo-segregationists use the purported defeat of Jim Crow to advance a set of solutions which leave racial enclaves untouched. They assert that—now that Black and Latino families have the legal right to live in any neighborhood they wish, and formal school segregation is nominally prohibited—any continuing racial patterns reflect a choice by those same families to live separately. Many maintain that not only is this choice clearly expressed, but it is in fact preferable and ultimately beneficial to the solidarity and economic prosperity of the groups in question. Despite overwhelming evidence of Black and Latino preference for integrated neighborhoods and decades of academic study showing the myriad ways that illegal discrimination produces segregation, neo-segregationists accept the status quo as proof that the status quo is desirable and inevitable.

This article traces Minnesota's civil rights heritage, including its historical contributions to the nation's movements for racial justice, its local innovations to promote integration and civil rights, and the emergence of the neo-segregationist opposition.

Part I briefly revisits the state's civil rights history, with an eye towards Minnesota's important role on the national stage. Part II discusses the pursuit of school integration in the state since *Brown v. Board of Education*, focusing on the recent resegregation of its schools. Part III discusses Minnesota's development, and then abandonment, of pioneering housing and urban development policies, which briefly served as a national model for housing integration.

Minnesota has in the past led the nation into progress on civil rights, creating some of the United States' most integrated schools and neighborhoods. People who would laud these victories can only fear the growing effectiveness of Minnesota's neo-segregationists,

and hope that, in this respect, the state does not once again act as a bellwether for the nation.

I. Minnesota's Civil Rights Heritage

Minnesota's role in the history of civil rights has been unique. Despite spending much of its history as one of the Whitest states,³ Minnesota has led the nation in passing and supporting foundational civil rights legislation, particularly systemic reforms to housing and schools. The state has also produced a hugely disproportionate share of leaders for racial justice, both Black and White.⁴ Some may argue that Minnesota's very Whiteness and homogeneity gave its political leaders freedom to act on these questions. Yet other equally-White states did not generate equivalent contributions. Instead, Minnesotan civil rights leadership is rooted, in large part, in a continuous intellectual and political heritage that can be traced to the Civil War and the state's founding years.

A. Early Years

Some of Minnesota's early territorial political leaders were abolitionists from Massachusetts, Maine, and New York.⁵ After the passage of the Kansas-Nebraska Act (which overruled the Missouri Compromise and allowed the population of each state to decide its own status on slavery), Minnesota entered into the union as a free state in 1858, with both its Democrats and Republicans strongly opposing slavery.⁶ Militant abolitionists protested the arrival of slaveholders on the St. Paul levy, at the hotels of slaveholders on vacation during Minnesota's temperate summers, and "kidnapped" slaves passing through the state in order to shepherd them to freedom.⁷ Minnesota's courts flouted the Supreme Court's *Dred*

3. *Whitest States 2021*, WORLD POP. REV. (2021), <https://worldpopulationreview.com/state-rankings/whitest-states> [<https://perma.cc/H27Z-UGUK>].

4. See JENNIFER A. DELTON, MAKING MINNESOTA LIBERAL: CIVIL RIGHTS AND THE TRANSFORMATION OF THE DEMOCRATIC PARTY XVI, at 76–77 (2002).

5. See WILLIAM D. GREEN, A PECULIAR IMBALANCE: THE FALL AND RISE OF RACIAL EQUALITY IN EARLY MINNESOTA 71–82 (2007) [hereinafter GREEN, A PECULIAR IMBALANCE] (noting that these leaders settled and were most prominent in St. Anthony Falls).

6. See *id.* at 73, 82–89 (explaining that while both parties agreed on their opposition to slavery, they differed over the issue of Black suffrage).

7. WILLIAM D. GREEN, DEGREES OF FREEDOM: THE ORIGINS OF CIVIL RIGHTS IN MINNESOTA, 1865–1912, at 23–25 (2015) [hereinafter GREEN, DEGREES OF FREEDOM].

Scott decision by freeing slaves brought into the state by slaveholders under the Minnesota Constitution.⁸

Minnesota was the first state to offer troops in the Civil War.⁹ The First Minnesota Volunteers suffered one of the highest casualties of any Northern regiment as they fought at Gettysburg, the turning point of the American Civil War.¹⁰ On the last day of Gettysburg, the First Minnesota seized the Virginia militia's battle flag.¹¹ For 150 years, Virginia has demanded its return, President Grover Cleveland ordered its return through an executive order, and Virginians initiated a federal lawsuit claiming Minnesota is in illegal possession of the flag.¹² Minnesota has refused, with former Governor Mark Dayton declaring the captured flag "something that was earned through the incredible courage and valor [sic] men who gave their lives and risked their lives to obtain it," and that "it would be a sacrilege to return it" to a state planning to commemorate the Confederacy.¹³

Minnesota Congressman Ignatius Donnelly fought to forbid educational segregation in public schools established or aided by federal funds.¹⁴ Minnesota legalized Black suffrage through public referendum two years before congressional ratification of the Fifteenth Amendment.¹⁵ In 1869, Minnesota outlawed racial segregation in its schools and enacted legislation to withhold all state funding to any segregated public school (nearly 100 years

8. The most famous case being that of Eliza Winston, a slave accompanying her mistress on vacation to Minnesota in 1860. Abolitionists brought a writ of habeas corpus, and Winston was freed from her master, who was staying at a lodge on Lake Harriet in Minneapolis. A Hennepin County Judge held that the Minnesota Constitution forbade slavery despite the U.S. Supreme Court's ruling that no state could do so. William D. Green, *Eliza Winston and the Politics of Freedom*, 57 MINN. HIST. 106, 107–08 (2000).

9. *The Civil War (1861-1865)*, MINN. HIST. SOC'Y, <https://www.mnhs.org/fortsnelling/learn/military-history/civil-war> [<https://perma.cc/G5U8-2BU7>].

10. Maja Beckstrom, *Minnesota Civil War Regiment Charged Into History at Gettysburg*, PIONEER PRESS (Feb. 4, 2017), <https://www.twincities.com/2013/06/28/minnesota-civil-war-regiment-charged-into-history-at-gettysburg/> [<https://perma.cc/U8QF-4VHJ>].

11. Brian Resnick, *150 Years After Gettysburg, Virginia and Minnesota Fight Over Confederate Flag*, ATLANTIC (June 28, 2013), <https://www.theatlantic.com/national/archive/2013/06/150-years-after-gettysburg-virginia-and-minnesota-fight-over-confederate-flag/313796/> [<https://perma.cc/7R79-DJLC>].

12. *Id.*

13. *Id.*

14. GREEN, A PECULIAR IMBALANCE, *supra* note 5, at 168.

15. *Id.* at 148.

before Congress would do the same with passage of Title VI of the 1964 Civil Rights Act).¹⁶

In 1883, the U.S. Supreme Court in the *Civil Rights Cases* declared that prohibiting discrimination in public accommodations was beyond the reach of Congress under the Fourteenth Amendment.¹⁷ Two years later, the Minnesota legislature outlawed segregation in public accommodations under state law.¹⁸ In 1921, after a racially motivated lynching in Duluth, Minnesota made lynching a crime decades before Congress would act.¹⁹

The national movement toward racial integration in schools and neighborhoods began in St. Paul in 1905 when Frank McGhee, a brilliant Black Minnesota attorney, agreed, in two historic strategy meetings with W.E.B. Du Bois, to form the Niagara movement.²⁰ The movement broke with the separatist policies of Booker T. Washington and would lead to the formation of the NAACP and its central strategy to end apartheid in schools and neighborhoods.²¹ McGhee would represent this movement by bringing legal actions against Jim Crow in Tennessee and other states.²² McGhee was the first in a series of great Black civil rights lawyers fighting for racial integration, a pantheon that would ultimately grow to include Charles Hamilton Houston and Thurgood Marshall.

McGhee was a trailblazer: out of Minnesota, a new generation of remarkable Black civil rights leaders would launch their careers, and an unusual number became icons of the national movement. Roy Wilkins, Clarence Mitchell Jr., Anna Arnold Hedgemen, and Whitney Young, who either grew up or started their careers in Minnesota, secured some of the early victories of the modern civil rights movement against racial covenants and employment discrimination in Minneapolis and St. Paul.²³ Based on these local achievements, they moved to the national stage to become some of

16. *Id.* at 169–70.

17. GREEN, DEGREES OF FREEDOM, *supra* note 7, at 124–25.

18. *Id.* at 130–32.

19. Marilyn Ziebarth, *Judge Lynch in Minnesota*, MINN. HIST. SOC'Y, Summer 1996, at 72, 72–73 [<https://perma.cc/B85Z-8KTN>]; *see generally* William D. Green, *To Remove the Stain: The Trial of the Duluth Lynchers*, MINN. HIST. SOC'Y, Spring 2004, at 22 (recounting the events of the lynching and public response afterwards).

20. GREEN, DEGREES OF FREEDOM, *supra* note 7, at 289–91.

21. *Id.* at 293–94.

22. *Id.* at 298; *see also* ANGELA JONES, AFRICAN AMERICAN CIVIL RIGHTS: EARLY ACTIVISM AND THE NIAGARA MOVEMENT 224 (2011).

23. *See* DELTON, *supra* note 4, at 76, 83.

the most important national Black civil rights leaders.²⁴ Wilkins would become the national executive director of the NAACP during its years of greatest accomplishment, Young the executive director of the National Urban League, and Hedgemen leader of the movement toward the adoption of the Fair Employment Practices Committee.²⁵

These iconic figures, together with Lena Smith, Minnesota's first Black female lawyer and chair of the Minneapolis NAACP,²⁶ Nellie Stone Johnson,²⁷ W. Harry Davis,²⁸ and Mathew Little,²⁹ would place racial integration of schools and neighborhoods at the heart of the civil rights movement in Minnesota, later at the center of the national struggle for freedom.

Minnesota experienced early successes that other places did not. As racial covenants and violence stopped residential integration in its tracks in Chicago, Detroit, and almost every northern city,³⁰ Smith and the Minneapolis NAACP defeated these tactics in a historical struggle in a south Minneapolis neighborhood.

In June of 1931, Arthur and Edith Lee, a Black couple, purchased a home at 4600 Columbus Avenue, in a White neighborhood bordering the "color line."³¹ After initial threats against the Lees failed, abusive crowds of thousands gathered

24. *Id.*

25. Roy Wilkins, NAACP, <https://naacp.org/find-resources/history-explained/civil-rights-leaders/roy-wilkins> [<https://perma.cc/JD5N-SSFL>]; Whitney M. Young, Jr., ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Whitney-M-Young-Jr> [<https://perma.cc/5K4B-SR2V>]; Emma Rothberg, Anna Arnold Hedgeman, NAT'L WOMEN'S HIST. MUSEUM, <https://www.womenshistory.org/education-resources/biographies/anna-arnold-hedgeman> [<https://perma.cc/EKX8-HQ64>].

26. Jackie Sluss, *Lena Olive Smith: Civil Rights in the 1930s*, HENNEPIN HIST. MAG., Winter 1995, <https://hennepinhistory.org/lena-olive-smith/> [<https://perma.cc/5H66-SY3M>].

27. DELTON, *supra* note 4, at 88–89.

28. W. Harry Davis, STAR TRIB. (Aug. 16, 2006), <https://www.startribune.com/obituaries/detail/8414425/> [<https://perma.cc/CNR2-DE3T>].

29. *Matthew Little: Fighting the Fires of Injustice*, MINN. HIST. SOC'Y, <https://www.mnhs.org/mgg/boom/building-life/6509> [<https://perma.cc/6BS3-SPDH>].

30. See generally JOE T. DARDEN & RICHARD W. THOMAS, DETROIT: RACE RIOTS, RACIAL CONFLICTS, AND EFFORTS TO BRIDGE THE RACIAL DIVIDE (2013) (providing historical analysis of racial conflict in Detroit and the violence that sprung from it); Whet Moser, *How White Housing Riots Shaped Chicago*, CHI. MAG. (Apr. 29, 2015), <https://www.chicagogmag.com/city-life/april-2015/how-white-housing-riots-shaped-chicago/> [<https://perma.cc/JTE4-UB2S>] (recounting decades of racial riots in Chicago and the similarities to how racial segregation developed and was sustained in Baltimore).

31. Ben Welter, *July 16, 1931: Angry White Mob Surrounds Minneapolis Home*, STAR TRIB. (May 29, 2020), <https://www.startribune.com/july-16-1931-angry-white-mob-surrounds-minneapolis-home/283979011/> [<https://perma.cc/4JCZ-KSTY>].

nightly around their house, throwing stones and firecrackers, and becoming increasingly violent.³² Rather than back down as others were forced to do all over the country, Lena Smith galvanized the local NAACP, churches, and reform organizations to defend the Lees.³³ Notably, she also personally appealed to progressive Governor Floyd B. Olson, who mobilized the Minnesota National Guard to disperse the crowds.³⁴ This was unprecedented in residentially segregated northern cities. Out of this victory would come the Tilsenbilt homes, likely the first intentionally racially integrated neighborhood in the United States.³⁵

B. *Emergence of the Civil Rights Movement*

Perhaps because of successes like these, many of Minnesota's political leaders remained strong civil rights advocates throughout the 20th century. This included Republican Party leaders, such as Governors Harold Stassen, Luther Youngdahl, Elmer L. Anderson, Harold LeVander, Al Quie, and Arne Carlson, who remained supportive of civil rights initiatives through the 1990s, even while many of their co-partisans had backed away from racial justice issues.³⁶ Governor Quie, when he served in Congress, even worked hand in hand with Hubert Humphrey to pass the 1964 Civil Rights Act.³⁷

But on the other side of the aisle, the issue had taken on an even greater importance. In 1944, the Minnesota Farmer-Labor Party, a left-leaning, anti-Wall Street, isolationist entity, merged with the more centrist Minnesota Democratic Party.³⁸ The Farmer

32. *Id.*

33. *Id.*

34. *Lena at 100: Celebrating a Civil Rights Icon*, MITCHELL HAMLIN (June 14, 2021), <https://mitchellhamline.edu/news/2021/06/14/lena-at-100-celebrating-a-civil-rights-icon/> [<https://perma.cc/3A8R-B3SY>].

35. Deebaa Sirdar & Richard L. Kronick, *Tilsenbilt Homes Historic District*, MINN. HIST. SOC'Y, <https://minneapolishistorical.org/items/show/174> [<https://perma.cc/U6JD-QD2R>].

36. Iric Nathanson, *From Mainstream to Extinct: A Look Back at the GOP's Progressive Era in Minnesota*, MINNPOST (Oct. 18, 2018), <https://www.minnpost.com/politics-policy/2018/10/from-mainstream-to-extinct-a-look-back-at-the-gops-progressive-era-in-minnesota/> [<https://perma.cc/8PBD-WKNM>].

37. See Doug Grow, *Remembering the Voting Rights Act – And an Era When Bipartisanship Wasn't Uncommon*, MINNPOST (July 31, 2015), <https://www.minnpost.com/politics-policy/2015/07/remembering-voting-rights-act-and-era-when-bipartisanship-wasnt-uncommon/> [<https://perma.cc/8SRE-WNVH>].

38. See DELTON, *supra* note 4, at 1–18 (providing background on the rise of the Farmer-Labor party and its merger with the Democrats); see generally JOHN EARL HAYNES, *DUBIOUS ALLIANCE: THE MAKING OF MINNESOTA'S DFL PARTY* (1984) (accounting for the historically fraught struggle between the Democratic and Farmer

Laborites disliked and feared the pro-business, internationalist bent of the Democrats. They agreed to merge only after receiving a clear commitment that the new, joint party would become the national leader in the one area where both factions saw eye-to-eye: civil rights issues.³⁹ Thus, the question of racial equality and integration became the mortar which fused Minnesota's DFL party together.

Hubert Humphrey would emerge as the leader of this new party.⁴⁰ True to the terms of the merger, Humphrey would, as mayor of Minneapolis, act immediately to fulfill the party's civil rights agenda. In 1947, civil rights leaders would work with Hubert Humphrey to abolish racial covenants in Minneapolis.⁴¹ Humphrey and the Minneapolis City Council would establish one of the nation's first fair employment ordinances that same year.⁴²

These local accomplishments immediately made Humphrey a national civil rights figure, not to mention a hero of the Americans for Democratic Action, an organization that would become the era's leading liberal voice for integration.⁴³ Humphrey built his national reputation as a liberal Democrat interested in human relations and was called on to speak to emerging civil rights organizations throughout the north.⁴⁴ "I have an unholy desire to communicate to eastern audiences," he told a columnist.⁴⁵

With Wilkins, Young, and Mitchell at his side—now national leaders in their own right—not to mention Lena Smith and Nellie Stone Johnson, young Hubert Humphrey would take on the President of the United States and the unified leadership of the Democratic Party to force the inclusion of a pro-integration civil rights plank in the national party platform.⁴⁶

The struggle is nowhere better described than in Robert Caro's book *The Master of the Senate*. At first, Humphrey was stymied in

Labor parties, their contentious merger into the Democratic Farmer Labor party, and how this influenced the generation of liberal Minnesotan politicians such as Hubert Humphrey and Walter Mondale that would follow).

39. DELTON, *supra* note 4, at 158–59.

40. See SOLBERG, *supra* note 1, at 122–23.

41. DELTON, *supra* note 4, at 104–10.

42. SOLBERG, *supra* note 1, at 106.

43. ROBERT CARO, *MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON III*, at 437 (2003).

44. DELTON, *supra* note 4, at 119.

45. *Id.*

46. CARO, *supra* note 43, at 438.

the party's platform committee.⁴⁷ Caro describes Humphrey's triumphant effort to drive a sea change in the party:

Humphrey was told to his face that speaking for the minority plank would ruin—permanently—his own career But, Humphrey was also to say, some issues were beyond compromise. “For me personally and for the party, the time had come to suffer whatever the consequences.”

. . .

For once his speech was short—only eight minutes long, in fact, only thirty-seven sentences.

And by the time Hubert Humphrey was halfway through those sentences, his head tilted back, his jaw thrust out, his upraised right hand clenched into a fist, the audience was cheering every one—even before he reached the climax, and said, his voice ringing across the hall, “To those who say we are rushing this issue of civil rights—I say to them, we are one hundred and seventy-two years late.”

“To those who say this bill is an infringement on states’ rights, I say this—the time has arrived in America. The time has arrived for the Democratic Party to get out of the shadow of states’ rights and walk forthrightly into the bright sunshine of human rights.”

“People,” Hubert Humphrey cried, in a phrase that seemed to burst out of him; it was not in the written text. “People! Human beings!—this is the issue of the twentieth century.” “In these times of world economic, political and spiritual—above all, spiritual—crisis, we cannot and we must not turn back from the path so plainly before us. That path has already led us through many valleys of the shadows of death. Now is the time to recall those who were left on the path of American freedom. Our land is now, more than ever before, the last best hope on earth. I know that we can—know that we shall—begin here the fuller and richer realization of that hope—that promise—of a land where all men are truly free and equal.”

. . .

While Humphrey had been speaking, there had been something else that Paul Douglas would never forget: “hard-boiled politicians dabbing their eyes with their handkerchiefs.”⁴⁸

The minority plank would win, 651.5 to 582.5.⁴⁹ The Dixiecrats would walk out.⁵⁰ Strom Thurmond, as their nominee, would win four states, but Truman would more than make up for this in an increased Black vote in northern states that would carry him to victory.⁵¹

47. *Id.* at 438–42.

48. *Id.* at 443–44.

49. *Id.* at 444.

50. *Id.*

51. *Id.*

After his election to the Senate, Humphrey would come to Washington as a liberal hero, but was initially marginalized by the Senate's political leadership.⁵² However, events eventually quickened the pace of progress.

Congressional liberals were empowered by developments like the 1954 *Brown* decision, and the emergence of Martin Luther King, Jr. and his work on the Montgomery bus boycott.⁵³ Episodes like the Little Rock Crisis and the growth of massive resistance began to impress upon Lyndon Johnson, at the time Senate Majority Leader, the importance of making headway on civil rights if he wanted to ever lay claim on the Democratic presidential nomination.⁵⁴

In this, Humphrey had a role to play. He began to serve as Majority Leader Johnson's conduit to the liberal faction of the legislature, and in that capacity helped Johnson break the Senate gridlock that had prevented the passage of civil right legislation for the past 80 years.⁵⁵ The 1957 and 1960 Civil Rights Acts were not substantive, but they represented a breaking of a dam, and suggested that future progress was on its way.⁵⁶

In 1963, civil rights leaders organized the March on Washington, arguably the most important single civil rights demonstration in modern history.⁵⁷ Of the "Big Six" who organized the March, three would be Minnesotans. In addition to Dr. King, John Lewis, and James Farmer, the six included Roy Wilkins, Whitney Young, and Anna Arnold Hedgemen, representing the NAACP, National Urban League, and National Council of Churches, respectively (the latter taking the place of A. Phillip Randolph, the aging head of the Brotherhood of Sleeping Car Porters).⁵⁸

52. See SOLBERG, *supra* note 1, at 133–39 (noting that Humphrey, initially hailed by *Time* as the "[n]o. 1 prospect for liberalism in this country," received low level committee appointments, was referred to as a fool by Senate leader Dick Russell, had his favored legislation blocked, and was publicly embarrassed by the questioning of Senator Robert Taft).

53. CARO, *supra* note 43, at 709–10.

54. *Id.* at 132–63.

55. SOLBERG, *supra* note 1, at 179–80.

56. *Id.* at 79; CARO, *supra* note 43, at 1032–33.

57. See generally WILLIAM P. JONES, *THE MARCH ON WASHINGTON: JOBS, FREEDOM, AND THE FORGOTTEN HISTORY OF CIVIL RIGHTS* (2013) (providing a comprehensive history of the March on Washington and its impact).

58. Tina Burnside, *Minnesota Advocate Anna Arnold Hedgeman Worked at the Intersection of Black and Women's Rights*, MINNPOST (Mar. 8, 2021), <https://www.minnpost.com/mnopedia/2021/03/minnesota-advocate-anna-arnold-hedgeman-worked-at-the-intersection-of-black-and-womens-rights/> [<https://perma.cc/JW4Y-KEEP>].

Humphrey's larger role would come after the March, as the floor leader for the passage of the 1964 Civil Rights Act, whose major planks involved employment and public accommodation.⁵⁹ Title VI allowed the Justice Department to commence school desegregation suits and the cutoff of federal funds to segregated schools and public housing.⁶⁰ The bill would take the whole summer of 1964, and Humphrey's legislative genius, especially bringing Illinois Republican Everett Dirksen into the fold, would be central to its passage.⁶¹

The leaders of the 1960s saw segregation as a central mechanism by which Black Americans were oppressed and understood the elimination of segregation to be a core aim, if not the core aim, of the entire movement. In his famous speech during the March on Washington, and over 100 other speeches and writings, King condemned segregation:

But 100 years later, the Negro is still not free. One hundred years later, the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination. One hundred years later, the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity. One hundred years later, the Negro is still languished in the corners of American society and finds himself in exile in his own land.⁶²

King was an unambiguous foe of segregation in schools and neighborhoods. He would write:

[I]f democracy is to live, segregation must die. Segregation is a glaring evil. It is utterly unchristian. It relegates the segregated to the status of a thing rather than elevate him to the status of the person. Segregation is nothing but slavery covered up with certain niceties of complexity. Segregation is a blatant denial of the unity which we all have in Christ Jesus.⁶³

Although the legal distinction between “de facto” and “de jure” segregation was not widespread at the time, writings from the period make it clear that leaders' concerns about segregation were not restricted to the mere existence of discriminatory laws, but the actual fact of racial separation. Humphrey himself would make this clear in his 1964 book *Integration vs Segregation*:

59. SOLBERG, *supra* note 1, at 221–27.

60. *Title VI of the Civil Rights Act of 1964*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/fcs/TitleVI> [<https://perma.cc/6CHM-KC47>].

61. See SOLBERG, *supra* note 1, at 223–27 (highlighting that Humphrey publicly praised and cultivated the support of Senator Dirksen from the start, constantly asking for his input and choosing to have negotiations take place in Dirksen's office).

62. Martin Luther King, Jr., *I Have a Dream*, Address at the March on Washington (Aug. 28, 1963).

63. Martin Luther King, Jr., *Facing the Challenge of a New Age*, Address at the First Annual Institute on Nonviolence and Social Change (Dec. 3, 1956).

A first essential is to comprehend the magnitude of the problem [of segregation] as it exists now, after generations of segregated education. In any part of the nation today, a Negro baby has only half the chance of completing high school, and one-third the chance of completing college, as a white baby born at the same time and place. And today, almost a decade after the Supreme Court ruling against segregated education, only about 9 per cent of the more than three million Negro children of school age in the southern and border states attend integrated schools.⁶⁴

And:

[O]ur society cannot refuse the Negro an equal education and then refuse to employ him in a decent job on the grounds that he is untrained. We cannot follow a deliberate policy of *apartheid* and then say we refuse to have our children associate with the Negro because of differences in behavior. Such differences as exist result from this very pattern of forcing the Negro's exclusion from the mainstream of American life.

... But if responsible leaders fail to act affirmatively and constructively, they lose the battle. If they wait for "public opinion to jell," the leadership role inevitably will be seized by racial extremists. Public opinion must be considered in shaping policy, but policy in itself is a powerful determinant of that opinion. For the successful desegregation and integration of our schools and communities, resolute leadership is essential.⁶⁵

C. *The Fair Housing Act*

No single piece of civil rights legislation has stronger Minnesota ties than the Civil Rights Act of 1968, also known as the Fair Housing Act.

Throughout the 1960s, civil rights campaigners had pushed for government action to eliminate segregation in housing.⁶⁶ These fair housing advocates had seen little success at the federal level but had won some limited victories in state and local contexts.⁶⁷ This was especially true in Minnesota, where both the city of Minneapolis and the state itself were early adopters of fair housing legislation.⁶⁸

64. INTEGRATION VS SEGREGATION 2 (Hubert H. Humphrey ed., 1964).

65. *Id.* at 6-7.

66. See generally JULIET Z. SALTMAN, OPEN HOUSING AS A SOCIAL MOVEMENT (1971) (studying the housing movement at the national and local levels during the 1950s and 1960s).

67. *Id.* at 127-28 (noting that New York, Denver, Los Angeles, and Seattle all had fair housing programs that ranged from limited to tremendous success).

68. SOLBERG, *supra* note 1, at 117-18; ANDERSEN, *supra* note 2, at 210.

In 1966, Dr. King campaigned for the Fair Housing Act in Chicago.⁶⁹ Dr. King's efforts in the suburbs of Chicago were met with violence.⁷⁰ Riots broke out in Watts and Cleveland shortly thereafter.⁷¹ Nearly 160 riots occurred across the country in July and August of 1967.⁷²

As a result, progress on fair housing legislation had ground to a halt by January 1968.⁷³ Regardless of the fact that they were in fact rooted in segregation, the riots created a backlash. Exploiting White fear coming out of the riots, conservative forces picked up many seats in the 1966 election, and Ronald Reagan rose to prominence as the governor of California.⁷⁴

As had happened with Humphrey twenty years prior, it was left to a young Minnesotan to spur representatives to abandon their course of inaction. With fair housing in a tough political spot, thirty-eight-year-old Walter Mondale was able to take leadership on the issue.⁷⁵ Ed Brooke of Massachusetts and Mondale co-authored a strong new fair housing amendment to an unrelated bill already moving through the Senate.⁷⁶ By pre-arrangement Humphrey himself was presiding over the bill and allowed Mondale to offer the amendment.⁷⁷

69. Walter F. Mondale, *Afterword: Ending Segregation: The Fair Housing Act's Unfinished Business*, in *THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FAIR HOUSING ACT* 291, 291–96 (Gregory Squires ed., 2017) [hereinafter Mondale, *Afterword*]; Mary Lou Finley, *The Open Housing Marches: Chicago Summer '66*, in *CHICAGO 1966: OPEN HOUSING MARCHES, SUMMIT NEGOTIATIONS, AND OPERATION BREADBASKET* 1, 1 (David J. Garrow ed., 1989).

70. Mondale, *Afterword*, *supra* note 69, at 291.

71. CHARLES LAMB, *HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS* 37 (2005).

72. *The Riots of the Long, Hot Summer*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/story/the-riots-of-the-long-hot-summer> [<https://perma.cc/SYR4-BGHV>].

73. Mondale, *Afterword*, *supra* note 69, at 291; *see also* LAMB, *supra* note 71, at 43–45 (noting that the legislation likely would not have later passed in 1968 had Dr. King not been murdered).

74. Cathleen Decker, *Analysis: Watts Riots Shifted State to the Right, But New Demographics Pushed It Left*, *L.A. TIMES* (Aug. 5, 2015), <https://www.latimes.com/local/politics/la-me-pol-watts-politics-20150806-story.html> [<https://perma.cc/W2SJ-5YU2>].

75. Mondale's account of the passage of the Fair Housing Act is available in several sources. *See, e.g.*, Walter F. Mondale, *Address to the 2015 National Fair Housing Conference* (Sept. 1, 2015); Mondale, *Afterword*, *supra* note 69.

76. Mondale, *Afterword*, *supra* note 69, at 291.

77. *Id.*

Southern senators launched a filibuster against the bill, and three cloture votes failed.⁷⁸ But on the day of the third vote, the Kerner Commission, tasked by President Johnson with uncovering the roots of the 1967 riots, finally released its report.⁷⁹ It attributed the riots to “residential segregation and the conditions of the ghetto.”⁸⁰ Helpfully, the report urged passage of a comprehensive fair housing bill to prevent similar riots.⁸¹

The Kerner report’s breadth and strong prescriptive conclusions jarred the fair housing law out of gridlock.⁸² Several years earlier, in 1966, Minority Leader Dirksen had declared Mondale’s fair housing proposal unconstitutional.⁸³ But with calls for action now coming from the public, from civil rights leaders, and from the Kerner Commission, he now expressed openness to compromise.⁸⁴ With assistance from President Johnson, the bill passed the Senate.⁸⁵

In the House, the law stalled again, this time in the Rules Committee.⁸⁶ But on April 4th, Dr. King was shot in Memphis, triggering riots nationwide, with one of the most severe outbreaks of violence happening in Washington, D.C. itself.⁸⁷ Forced to react, the House passed the bill on April 10th, and the Fair Housing Act was signed into law the next day.⁸⁸

In 2017, Mondale would reflect on the Act:

Above all Congress intended—as the Supreme Court recently held—that the Fair Housing Act serve as a new, powerful tool to end racial residential segregation and to replace racial ghettos with vibrant and racially integrated neighborhoods. The events of the late 1960s highlighted how deeply interwoven segregation was into the social fabric of American cities, and how concertedly American institutions had worked to maintain it. Racial separation, once enforced as policy, was now perpetuated as a matter of habit through the actions of public

78. *Id.* At the time, sixty-seven votes were needed to end a filibuster. *Id.*

79. *Id.* at 291–92.

80. *Id.* at 292.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See id.* (“I called President Johnson and told him that Bob Bartlett of Alaska wanted the filibuster to remain a strong tool for small states like Alaska, but that he also badly wanted a certain federal construction project. After a moment’s silence, I heard the president say, ‘Thank you,’ and there was a click. Bob Bartlett voted for cloture and we ended the filibuster . . .”).

86. *Id.*

87. *Id.*

88. *Id.*

agencies and private citizens alike. Especially after the Kerner Commission report, Congress understood that integration was the only mechanism for attacking the root causes of the discrimination and suffering that plagued American cities. Halting segregation, dismantling it, and building integration were the overriding objectives of the [Fair Housing Act], the end goals towards which all its provisions were to be directed.⁸⁹

For over a century, Minnesota has blazed a trail on civil rights in ways large and small. Its advocates and activists were instrumental in forging the 20th century's civil rights movement, and from the end of World War II, its elected leaders have been at the front lines of the legislative battle to fulfill the promise of *Brown v. Board of Education* and to make the guarantees of the Fourteenth Amendment a lived reality in American society. These courageous individuals risked their careers, endured threats and abuse, and two leaders—Hubert Humphrey and Walter Mondale—paid the ultimate political price, losing the presidency to opponents who campaigned on White reactionary and segregationist sentiment.⁹⁰

II. School Desegregation

Like in almost all of America's major cities, schools in Minneapolis and St. Paul were racially segregated in the first half the 20th century.⁹¹ However, the city's residents—and the state government—embraced desegregation efforts more readily than many others. Starting in the 1960s, various governmental entities in Minnesota began to proactively attack school segregation. Minn. Stat. § 123B.30, first enacted in 1959, forbade segregation on penalty of losing funding:

No district shall classify its pupils with reference to race, color, social position, or nationality, nor separate its pupils into different schools or departments upon any of such grounds. Any district so classifying or separating any of its pupils, or denying school privileges to any of its pupils upon any such ground shall forfeit its share in all apportioned school funds for any apportionment period in which such classification, separation, or exclusion shall occur or continue.⁹²

In 1967, the state added an additional anti-segregation provision to the Minnesota Human Rights Act forbidding local

89. *Id.*

90. See LAMB, *supra* note 71, at 45; DELTON, *supra* note 4, at xii–xiii.

91. Greta Kaul, *With Covenants, Racism Was Written into Minneapolis Housing. The Scars Are Still Visible*, MINNPOST (Feb. 22, 2019), <https://www.minnpost.com/metro/2019/02/with-covenants-racism-was-written-into-minneapolis-housing-the-scars-are-still-visible/> [<https://perma.cc/36YZ-2UZD>].

92. MINN. STAT. § 123B.30 (2020).

school districts from “discriminat[ing] in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race, color, creed”⁹³ Discrimination is expressly defined to include segregation or separation.⁹⁴ The law also defined a discriminatory practice to “exclude, expel, or otherwise discriminate against a person seeking admission as a student, or a person enrolled as a student because of race, color, creed”⁹⁵

By the early 1970s, state educational policy started galvanizing against segregation in earnest. Although federal law had begun to distinguish between *de jure* and *de facto* segregation, the Minnesota Board of Education announced its intention to regulate and reduce both types in 1967.⁹⁶ In 1973, the Minnesota Department of Education promulgated its first desegregation rule.⁹⁷ This rule applied flexible racial ratios in accordance with the Supreme Court’s approved remedial framework outlined in *Swann v. Charlotte-Mecklenburg Board of Education*.⁹⁸

Near simultaneously, local efforts to end racial segregation in schools begin to bear fruit—although not without some resistance in local government. In the late 1960s, a collection of parents sought to combine two South Minneapolis elementary schools, Field and Hale, one of which was predominantly Black and the other of which was predominantly White.⁹⁹ After successfully combining, both schools served all children in the area, with students attending Hale kindergarten through third grade and Field fourth through sixth grade.¹⁰⁰

A federal school desegregation lawsuit, *Booker v. Special School District No. 1*, was filed against Minneapolis, resulting in a court-enforced desegregation order in 1972.¹⁰¹ The decision creating the order cited “optional attendance zones,” the “size and location of

93. MINN. STAT. § 363A.13(1) (2020).

94. MINN. STAT. § 363A.03(13) (2020).

95. MINN. STAT. § 363A.13(2) (2020).

96. See State of Minn. Dep’t of Child., Families, & Learning, Statement of Need and Reasonableness, In the Matter of Proposed Rules Relating to Desegregation: Minnesota Rules Chapter 3535 (3535.0100 to 3535.0180) (1998) [hereinafter 1998 SONAR] (discussing the history of desegregation efforts and regulations in Minnesota).

97. See *id.*

98. *Id.* at 2; see *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

99. See, e.g., Brandt Williams, *40 Years Later, Minneapolis Parents Recall Bussing’s Start*, MPR NEWS (May 4, 2012), <https://www.mprnews.org/story/2012/05/04/minneapolis-busing-40-year-anniversary> [<https://perma.cc/CJ2Z-P6MN>].

100. See *id.*

101. See *Booker v. Special Sch. Dist. No. 1*, 351 F. Supp. 799 (D. Minn. 1972).

schools,” “transfer policies,” and “racially motivated” boundaries as evidence of *de jure* segregation by the district.¹⁰² For the following decade, the court helped guide policies such as school boundary decisions and conducted annual reviews of the district’s progress towards integration.¹⁰³

In the mid and late 1970s, the Minneapolis district and the state battled over the scope and reach of Minnesota desegregation rules. In 1978, the state released an administrative rule that would regulate not just intentional *de jure* segregation but also *de facto* segregation.¹⁰⁴ Local districts argued such a rule was impermissible, but in a 1978 Statement of Need and Reasonableness (SONAR), the Minnesota Attorney General and statewide Board of Education declared that such authorities were clearly intended by the state legislature.¹⁰⁵

The Minneapolis district retaliated by challenging the state’s authority to regulate *de facto* segregation in administrative proceedings, both on constitutional and state law grounds.¹⁰⁶ An administrative law judge upheld the state’s regulation of *de facto* segregation and rejected every aspect of Minneapolis’s challenge.¹⁰⁷ The judge found ample constitutional grounding for Minnesota’s rules in the Supreme Court’s 1971 *Swann* decision, which clearly distinguished between target racial ratios and prohibited quotas or racial balancing.¹⁰⁸ The opinion upheld the state’s authority to forbid *de facto* segregation by examining the § 123B.30 statutory prohibition of segregation and the even broader prohibition of the Minnesota Human Rights Act.¹⁰⁹ The opinion noted that the legislature had acquiesced to these regulations by repeatedly

102. *Id.* at 804, 809.

103. Many of the records related to the *Booker* decision are difficult to access today and perhaps lost altogether—a not uncommon predicament for desegregation plaintiffs. However, in 1978, midway through the courts’ oversight of the *Booker* decision, one challenge to the case rose to the federal circuit courts, where it was defeated. *See Booker v. Special Sch. Dist. No. 1*, 585 F.2d 347 (8th Cir. 1978).

104. *See State of Minn. Dep’t of Educ., In the Matter of: The Proposed Amendments to Rules of the State Board of Education Governing Equality of Educational Opportunity and School Desegregation, Statement of Need and Reasonableness* (1978).

105. *Id.*

106. *See State of Minn. Off. of Hearing Exam’rs, Rep. of Hearing Exam’r, In the Matter of the Proposed Adoption of Rules of the State Board of Education Governing the Standard for Determining School Segregation and Community Services Dealing Specifically with the Limitations on Aids and Levies and the Annual Reporting Data* (1978).

107. *See id.*

108. *Id.* at 1.

109. *Id.* at 4.

funding transportation, construction, and other activities undertaken in the course of desegregation.¹¹⁰

By the early 1980s, much of the resistance to school desegregation in the Twin Cities had faded into apparent consensus. The legal and policy worlds seemed to agree: Minnesota's desegregation efforts were working. The Minneapolis desegregation order was dissolved in 1983 to give the district "the opportunity for autonomous compliance with constitutional standards."¹¹¹ Notably, the court did not find that the Minneapolis school district was integrated or unitary, and received assurances that the State Department of Education was "willing and able to assume the duty of monitoring the further implementation of the District's desegregation/integration plan."¹¹²

A. *The Rise of School Choice*

Starting in the late 1980s, school diversity increased rapidly in Minnesota. While most non-White segregation had previously been between schools in the same district—primarily in Minneapolis and St. Paul—now, interdistrict segregation, where entire districts were racially isolated, had begun to grow rapidly.¹¹³ As strong as the existing desegregation rules were in Minnesota, they imposed no interdistrict remedies—meaning districts, acting alone, could not avoid becoming segregated if their demographics shifted too much.

These shifts brought a wave of new attention to the problem of racial segregation. But while Minnesota had historically confronted segregation head-on with strong integration measures, this time would be different. Many of the state's public and private leaders and advocates would instead promote remedies that avoided integration—or worse, increased segregation outright—in misguided attempts to eliminate the harms of segregation without eliminating the thing itself.¹¹⁴

In a national context, the most significant of these efforts was the invention of the charter school and the expansion of school

110. *Id.* at 3.

111. *Booker v. Special School District No. 1*, No. 4-71 Civ. 382, slip op. at 5 (D. Minn. June 8, 1983).

112. *Id.* at 4.

113. MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* 39–41 (Brookings Inst. & Lincoln Inst. of Land Pol'y eds., 1997).

114. See Rachel Cohen, *The Untold History of Charter Schools*, *DEMOCRACY* (Apr. 27, 2017), <https://democracyjournal.org/arguments/the-untold-history-of-charter-schools/> [<https://perma.cc/8S87-MRRZ>].

choice. Although the name and the idea of independent schools stretched back decades, the modern concept of a school choice was born in Minnesota in the late 1980s.¹¹⁵ A Minnesota reformer, Ted Kolderie, developed a theory of how education could be improved by inserting market-like competition into the supposedly monopolistic, non-competitive system governed by school boards.¹¹⁶ Although Kolderie's initial broad proposal did not explicitly position itself as an alternative to segregation, it did identify segregated urban schools as the areas in need of reform.¹¹⁷ Another Minnesota-based education reformer, Joe Nathan, spent much of the 1980s working with conservative governors to increase support for greater school choice, including vouchers.¹¹⁸

Some Minnesota policymakers and advocates seized on the ideas of Nathan and Kolderie as the vehicle to address the state's growing educational inequities. The Citizens League, a major nonprofit in the Twin Cities area, developed these early charter ideas into the nation's first complete proposal for the creation of charter schools.¹¹⁹ The Citizens League proposal addressed the elephant in the room—desegregation—head-on. The proposal argued that, absent a charter school plan, the Twin Cities would have no choice but to adopt strong desegregation remedies, including redrawing or merging existing school districts.¹²⁰ This dramatic reconfiguration was put forward as the only alternative to the creation of Minnesota charter schools.¹²¹

Throughout this process, advocates of charter schools and school choice received support from groups positioned on the center-right and center-left. The Minnesota Business Partnership, which represented the leadership of some of the state's largest companies, heavily endorsed the idea of choice-based school reform.¹²² The Progressive Policy Institute, a think tank founded by Bill Clinton's Democratic Leadership Council, consulted with Kolderie in 1990, and Kolderie subsequently produced policy papers about choice for

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* See also EMBER REICHGOTT JUNGE, ZERO CHANCE OF PASSAGE: THE PIONEERING CHARTER SCHOOL STORY (Beaver's Pond Press ed., 2012) for a brief history of the Minnesota roots of charter schools.

119. Cohen, *supra* note 114.

120. See CITIZENS LEAGUE, CITIZENS LEAGUE REPORT: CHARTERED SCHOOLS = CHOICES FOR EDUCATIONS + QUALITY FOR ALL STUDENTS (1988).

121. *Id.* at 19–20.

122. See JUNGE, *supra* note 118.

the Institute.¹²³ Ultimately, Minnesota enacted some of the nation's earliest and strongest school choice measures. These included an expansive open enrollment law in 1987 and the nation's first charter school law in 1992.¹²⁴

Minnesota's charter schools were deeply segregated from the very beginning. Today, almost all of the Twin Cities' most segregated schools—both non-White *and* White—are charters.¹²⁵ Charter schools facilitate segregation in a number of ways.

First, as schools of choice, they have proven convenient vehicles for White flight from diverse traditional public schools.¹²⁶ Although all children are equally eligible to enroll in a charter, not every child is equally able to attend, due to practical obstacles such as transportation or curricular concerns.¹²⁷ As a consequence, heavily White charters have experienced very rapid growth in Twin Cities suburbs, where traditional schools are quickly becoming more diverse.¹²⁸

In addition, charters are forced to recruit their student bodies from the student population, and many have opted to do so by billing themselves as racially targeted or culturally focused.¹²⁹ Minnesota is home to Afro-, Hmong-, Latino-, and Somali-centric charter schools, which explicitly recruit students on claimed commonalities.¹³⁰ Although there are no explicitly White-segregated charter schools, there are a number of European-oriented schools, such as a Russian language charter (96% White) and a classical academy (76% White).¹³¹ In one particularly egregious case, a German immersion charter, which was 88% White, opened nine blocks from a traditional public school serving the same grades, which was only 8% White.¹³²

123. Cohen, *supra* note 114.

124. See JUNGE, *supra* note 118.

125. INST. ON METRO. OPPORTUNITY, THE MINNESOTA SCHOOL CHOICE PROJECT: PART I: SEGREGATION AND PERFORMANCE 2 (2017), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1125&context=imo_studies [hereinafter MINN. SCHOOL CHOICE PROJECT] [<https://perma.cc/B86U-5HH6>].

126. *Id.* at 9.

127. INST. ON METRO. OPPORTUNITY, FAILED PROMISES: ASSESSING CHARTER SCHOOLS IN THE TWIN CITIES 44–46 (2008) [hereinafter FAILED PROMISES].

128. See MINN. SCHOOL CHOICE PROJECT, *supra* note 125; INST. ON METRO. OPPORTUNITY, CHARTER SCHOOLS IN THE TWIN CITIES: 2013 UPDATE 1 (2013); FAILED PROMISES, *supra* note 127.

129. Will Stancil, *Charter Schools and School Desegregation Law*, 44 MITCHELL HAMLINE L. REV. 455, 480 (2018).

130. See *id.* at 473–81; FAILED PROMISES, *supra* note 127.

131. Stancil, *supra* note 129, at 477–78.

132. *Id.* at 456.

As a result of these dynamics, and as the recipients of a blanket exemption from the state desegregation rule, charters are overwhelmingly more segregated than their traditional school counterparts. Of the 50 most segregated schools in the Twin Cities region, 45 are charters.¹³³ The region contains 78 schools that are more than 95% non-White; 59 are charters.¹³⁴ Out of all charter enrollees, 72% of Black students, 68% of Hispanic students, and 74% of Asian students are attending a highly segregated, more than 90% non-White, school.¹³⁵ At traditional schools, the equivalent figures are 16%, 11%, and 18%, respectively. Similarly high levels of segregation have existed at charters since at least the 1995–1996 school year.¹³⁶

Minnesota's other major school choice mechanism, open enrollment, has also come to severely worsen segregation.¹³⁷ Initially, open enrollment options were limited by desegregation rules—a student could not enroll into a new district if the change would worsen segregation.¹³⁸ But the policy was exempted from desegregation rules in 2001, and additional resegregation followed rapidly.¹³⁹

A 2013 study examined the effect of open enrollment on district demographics. In the 2000–2001 school year, 12% of White students' open enrollment moves were integrative in effect, and 20% were segregative in effect.¹⁴⁰ The remainder were neutral (i.e., between two similarly composed school districts).¹⁴¹ By 2010, over a third—36%—were segregative in effect, while 19% were integrative in effect.¹⁴²

The school districts most affected by open enrollment are those in rapidly diversifying suburbs, where the policy provides an escape route for White families concerned about integrated schools.¹⁴³ These communities include Richfield, Columbia Heights, Osseo,

133. See MINN. SCHOOL CHOICE PROJECT, *supra* note 125.

134. *Id.* at 4.

135. *Id.* at 12–14.

136. *Id.*

137. See INST. ON METRO. OPPORTUNITY, OPEN ENROLLMENT AND RACIAL SEGREGATION (2013) [hereinafter OPEN ENROLLMENT AND RACIAL SEGREGATION].

138. See Margaret C. Hobday, Geneva Finn & Myron Orfield, *A Missed Opportunity: Minnesota's Failed Experiment with Choice-based Integration*, 35 WM. MITCHELL L. REV. 936, 953–55 (2009).

139. See *id.* at 959.

140. OPEN ENROLLMENT AND RACIAL SEGREGATION, *supra* note 137, at 7.

141. *Id.*

142. *Id.*

143. *Id.* at 9.

and Robbinsdale.¹⁴⁴ Meanwhile, a number of districts serve as White flight hubs, receiving a significant portion of their overall student body as open enrollees from neighboring districts.¹⁴⁵ These include St. Anthony, Mahtomedi, Edina, and Minnetonka.¹⁴⁶

Some districts have utilized open enrollment and diversifying neighborhoods as a strategy for recruiting wealthier student bodies. For example, four districts bordering the Minnetonka district have officially considered or implemented integrative boundary changes.¹⁴⁷ While its neighbors considered these plans, the Minnetonka school district launched an expensive and unusual paid advertising plan in local newspapers, television, and radio.¹⁴⁸ According to superintendents of neighboring districts, the Minnetonka district was engaged in an active effort to recruit skittish parents.¹⁴⁹ Not only could these efforts increase White segregation in Minnetonka schools, but they undermine attempts by neighboring districts to maintain demographically balanced schools.

B. Conflict Over Minnesota's Desegregation Rules in the 1990s

While Minnesota was introducing new school choice mechanisms that increased segregation, it was also weathering a conflict over the desegregation rules that existed in the early 1990s. A new rule was adopted in 1999 that reflected the views of integration skeptics, which led to additional legal and political conflict over segregation that continues to the present day.¹⁵⁰ Over time, many of the groups that had been previously involved in efforts for greater school choice enmeshed themselves in the desegregation rule battle. In fact, some of the strongest and most vocal advocates for reduced desegregation have been the very charter schools that Minnesota created in the early 1990s.¹⁵¹

In 1994, the Minnesota State Board of Education proposed a metropolitan-wide desegregation rule to resolve the growing

144. *Id.*

145. *See id.*

146. *See id.*

147. *Id.* at 19; *see also* Anthony Lonetree & MaryJo Webster, *Open Enrollment Keeps Students, Resources Flowing into Minnetonka*, STAR TRIB. (Jan. 13, 2018), <https://www.startribune.com/open-enrollment-keeps-students-resources-flowing-into-minnetonka/469168323/> [<https://perma.cc/N9RL-HTDT>].

148. Lonetree & Webster, *supra* note 147.

149. *Id.*

150. Hobday et al., *supra* note 138, at 958–63.

151. *See id.*

problem of interdistrict segregation.¹⁵² The rule used flexible racial ratios as integration targets.¹⁵³ A draft of the rule was provided to the Minnesota legislature, which indicated its approval by authorizing the Board to make new rules.¹⁵⁴ The authorization contained important limitations to ensure the Board directly addressed the question of segregation: “In adopting a rule related to school desegregation/integration, the state board shall address the need for equal educational opportunities for all students and racial balance as defined by the state board.”¹⁵⁵ In the same law, the legislature established a new “office of desegregation/integration” to “coordinate and support activities” related to interdistrict integration efforts.¹⁵⁶

But before they could be promulgated, the newly proposed rules were swallowed by a sharp political backlash, spurred in part by the suburbs’ sudden inclusion in civil rights regulation.¹⁵⁷ Katherine Kersten, a conservative political columnist for the *Star Tribune*, launched frequent attacks against the proposal, and Bob Wedl, the Assistant Commissioner of the Department of Education, began to lobby for an alternative, “voluntary” integration approach.¹⁵⁸ Talk radio also pilloried the proposed rules and a separate, related set of “diversity rules.”¹⁵⁹ The Department of Education received “hundreds of calls and letters concerning the proposed rules—including two death threats.”¹⁶⁰ After years in limbo, the second set of rules was withdrawn, and soon thereafter, the State Board of Education was abolished altogether.¹⁶¹

The governor’s office and particularly the Attorney General’s office were asked to respond to the controversy. The governor’s office was silent. Although the Chief Deputy Attorney General, John Tunheim, had been long supportive of civil rights, he was nominated by President Clinton in June of 1995 to be a federal judge for the District of Minnesota, removing him from the debate.¹⁶²

152. *Id.* at 953.

153. *Id.* at 954.

154. *Id.* at 955.

155. Minn. Stat. § 121.11 subd. 7d(b) (1994).

156. Minn. Stat. § 121.1601 (1994).

157. See Hobday et al., *supra* note 138, at 951.

158. *Id.* at 951–58.

159. *Id.* at 957–58.

160. *Id.* at 958.

161. *Id.*

162. *Tunheim, John R.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/tunheim-john-r> [<https://perma.cc/J3FA-S9S9>].

Tunheim's replacement, Lee Sheehy, appeared to have very different views on the advisability of desegregation. Sheehy was an ally of Minnesota Attorney General Hubert "Skip" Humphrey III, who was at the time running for governor.¹⁶³ Both Sheehy and Humphrey were members of the moderate center wing of the Democratic Party—a wing that, during the Clinton years, was defined in part by its intense concern about the political costs of Democrats' traditional defense of civil rights for Black Americans.¹⁶⁴ School integration in particular, which raised the bogeyman of "forced" busing, was considered too toxic a subject for any Democrat.¹⁶⁵ Democratic politicians especially feared the impact of desegregation on suburban voters and believed that aggressive desegregation plans would so alienate and anger White suburban voters that statewide political victories would become impossible.¹⁶⁶ Under Sheehy, the tenor of the Attorney General's office towards the proposed desegregation rules changed dramatically.

Sheehy was not the only individual in the Minnesota Attorney General's office hostile to the new desegregation plan. An Assistant Attorney General, Cindy Lavorato, took a major role in the conflict over the rule. Lavorato was the daughter-in-law of James I. Rice, 25-year state house member and powerful committee chair.¹⁶⁷ Lavorato would distinguish herself over the next two decades as one of the state's most tireless opponents of school integration.¹⁶⁸

163. See *Lee Sheehy*, LIVING CITIES, <https://livingcities.org/people/lee-sheehy/> [<https://perma.cc/267E-XV4N>] (listing Sheehy as Attorney General Hubert Humphrey's Chief Deputy).

164. See generally, see generally THOMAS EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1992) for a survey of the views on race that motivated moderate Democrats in the 1990s.

165. See *id.* at 143.

166. *Cf. id.* (positing that "[t]he positions adopted by the national Democratic party in favor of racial preferences and busing were critical in allowing the national Republican party to take over the political and philosophical center.").

167. *Louis A. Lavorato*, IOWA JUD. BRANCH, <https://www.iowacourts.gov/for-the-public/educational-resources-and-services/iowa-courts-history/past-justices/louis-a-lavorato> [<https://perma.cc/DR58-MC3F>]; *Rice, James Isaac "Jim"*, MINN. LEGIS. REF. LIBR., <https://www.lrl.mn.gov/legdb/fulldetail?ID=10561> [<https://perma.cc/9KZQ-BUH4>].

168. For instance, when the state attempted to modify the integration rule in 2016 to include charter schools, Lavorato was hired as the primary representative of charters in the rulemaking proceedings, testifying extensively against the change and submitting several lengthy sets of written comments. See Transcript of Public Hearing, In the Matter of Proposed Rules Governing Achievement and Integration, State of Minn. Off. of Admin. Hearings for the Minn. Dep't of Educ. (No. 65-1300-32227) (Jan. 7, 2016) [hereinafter Public Hearing Transcript]; Memorandum of Law in Support of the Disapproval of MDE'S Proposed Desegregation/Integration Rules Due to Four Substantive Defects, In the Matter of Proposed Rules Governing

In addition to the rulemaking, several other events brought the conflict over integration to a head. First, the Minneapolis school district proposed ending its existing school assignment plan, which had been in operation since the 1970s, mostly under a desegregation court order.¹⁶⁹ In its place, the district sought to implement a “neighborhood schools” plan, which would leave the racially segregated areas of the city attending equally segregated schools.¹⁷⁰

Second, the Minneapolis NAACP filed a lawsuit against the state of Minnesota, bringing novel state-law claims that the schools were impermissibly segregated.¹⁷¹ The lawsuit’s plaintiffs sought, in particular, interdistrict desegregation mechanisms in an attempt to stem the problem of interdistrict segregation that had been growing since the late 1980s.¹⁷²

In short, the pro- and anti-integration forces begin to cohere into discrete camps. On the pro-integration side was arrayed the NAACP, traditional civil rights organizations, the State Board of Education with its newly proposed rule, and the lawsuit plaintiffs. But that could scarcely compare to the strength of the anti-integration side, which included most of the top figures at the Attorney General’s office: Assistant Commissioner Wedl and the powerful columnist Kersten.¹⁷³

As the defense against the NAACP lawsuit began to merge with the larger question of the new statewide integration rule, the anti-integrationists began to pull in outside aid. The 1996 budget provided the state education department \$700,000 for costs related to litigation of the NAACP lawsuit.¹⁷⁴ While records showing the full use of this expenditure are lost, at least several telling facts are known.

Kersten, the conservative columnist, had recommended that the state seek the aid of Alfred Lindseth, a politically-connected, conservative lawyer and longtime opponent of desegregation

Achievement and Integration (OAH 1300-32227), State of Minn. Off. of Admin. Hearings; Memorandum of Law in Support of the Disapproval of MDE’s Proposed Desegregation/Integration Rules as Fatally Defective, In the Matter of Proposed Rules Governing Achievement and Integration (OAH 1300-32227), State of Minn. Off. of Admin. Hearings.

169. Hobday et al., *supra* note 138, at 956.

170. Myron Orfield, *Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement*, 24 LAW & INEQ. 269, 298 (2006).

171. *Id.* at 311–12.

172. *Id.*

173. See Hobday et al., *supra* note 138 (providing an overview of the conflict over integration in the Minnesota state government in the 1990s).

174. 1996 Minn. Laws 739, ch. 471, art. 11, § 4, subd. 2 (1996).

plans.¹⁷⁵ Lindseth had taken a particularly active role opposing and dismantling integration plans in southern states, like North Carolina and Georgia. His clients often included school districts fighting court-ordered integration, and he appeared for the defendants in seminal desegregation cases like *Jenkins v. Missouri* and *Sheff v. O'Neill*.¹⁷⁶ Minnesota later hired Lindseth to work on its desegregation defense.¹⁷⁷

Next, the Attorney General's office and state education department hired two national experts, David Armor and Christine Rossell, who had made their names fighting desegregation lawsuits in previous decades.¹⁷⁸ Indeed, Armor and Rossell had been so prominent resisting integration that they had turned it into a cottage industry. Armor states that he has appeared in over 50 segregation cases and authored a book chapter about the experience of serving as an expert witness for school districts trying to escape court orders;¹⁷⁹ Rossell appears to have appeared as a defense-side expert in over 75 cases.¹⁸⁰ Indeed, the pair held a virtual monopoly over this lucrative market sector. When the U.S. Supreme Court considered desegregation in the 2007 case *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, over 550 social scientists filed or signed amicus briefs in support of integration.¹⁸¹ Rossell and Armor were two of six experts filing briefs for the plaintiffs attempting to eliminate integration plans.¹⁸² Both Armor

175. KATHERINE KERSTEN, GOOD INTENTIONS ARE NOT ENOUGH. THE PERIL POSED BY MINNESOTA'S NEW DESEGREGATION PLAN 58 (1995).

176. See, e.g., Scott Shepard, *Court-Ordered Busing Is Running Out of Gas; Desegregation Tool Falls Out of Favor; Focus of Battle Is Shifting to State*; Courts, ST. LOUIS POST-DISPATCH (Apr. 8, 1998), [<https://perma.cc/SD6D-VJPE>]; George Judson, *When Good Will Is Not Enough: Desegregation Project at Heart of Hartford School Suit*, N.Y. TIMES (Feb. 1, 1993), [<https://perma.cc/HD3J-VYVB>].

177. See Alfred A. Lindseth, EVERSHEDES SUTHERLAND, <https://us.eversheds-sutherland.com/People/Alfred-A-Lindseth> [<https://perma.cc/CB2T-222T>].

178. Hobday et al., *supra* note 138, at 961–964.

179. David J. Armor, *Reflections of an Expert Witness, in THE END OF DESEGREGATION?* 3–23 (Stephen J. Caldas & Carl L. Bankston eds., 2003); *Biography of David J. Armor*, SCHAR SCH. OF POL'Y AND GOV'T, GEO. MASON, <https://schar.gmu.edu/about/faculty-directory/david-j-armor> [<https://perma.cc/2X6G-66NX>].

180. *Curriculum Vitae of Christine Rossell*, POL. SCI., B.U., <https://www.bu.edu/polisci/files/2020/10/Rossell-Vita-10-13-20.pdf> [<https://perma.cc/539W-A9UV>].

181. See Brief of 553 Social Scientists in Support of Respondents, Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007).

182. See Brief of Amici Curiae Drs. Murphy, Rossell and Walberg in Support of Petitioners, Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007); Brief of David J. Armor, Abigail Thernstrom, and Stephan Thernstrom as *Amici Curiae* in Support of Petitioners, 551 U.S. 701 (2007).

and Rossell had frequently been employed by Lindseth in past anti-integration endeavors.¹⁸³

Both the lawsuit and the rulemaking process wound to a conclusion in the late 1990s. As a result of conflicts related to the integration rule, the State Board of Education was ultimately abolished and replaced by a Commissioner of Education.¹⁸⁴ Meanwhile, the Department of Education and the Attorney General's office had already begun to strip the strongest desegregation tools out of the Board's original proposal.¹⁸⁵

But one major twist remained. On September 17, 1998, the Attorney General's office released a Statement of Need and Reasonableness (SONAR) that unexpectedly and dramatically weakened the proposed integration rule.¹⁸⁶ The newly released SONAR, authored by Cindy Lavorato, marked a sharp break with previous iterations of the rule.¹⁸⁷ It altered the definition of segregation to only include intentional, *de jure* discrimination, limited the mandatory interdistrict integration requirements, and raised the standard for proving intentional discrimination far above that required by the U.S. Supreme Court.¹⁸⁸ The SONAR also argued that interdistrict open enrollment rules could not be guided by integration requirements, and, on policy grounds, it exempted charter schools from its provisions altogether, though they had previously been subject to desegregation rules.¹⁸⁹

Although the lawsuit defense and rulemaking were nominally separate, Lindseth's influence on the rulemaking process was clear. Several passages of the SONAR closely resembled passages he had published.¹⁹⁰ In addition, the SONAR contained a number of legal conclusions that exhibited obvious hostility to the notion of school integration—and echoed prior Lindseth arguments.¹⁹¹ The SONAR concluded that there was no compelling government interest in K-12 integration absent proof of intentional discrimination—limiting

183. See, e.g., David Armor, Why the Gap Between Black and White Performance in School? (Testimony of David James Armor, March 5, 6, & 22, 1995), 66 J. Negro Educ. 311; *Stell v. Bd. of Pub. Educ.*, 724 F. Supp. 1384, 1393–96 (S.D. Ga. 1988).

184. Hobday et al., *supra* note 138, at 958.

185. *Id.* at 958–960.

186. See 1998 SONAR, *supra* note 96.

187. Hobday et al., *supra* note 138, at 955.

188. See 1998 SONAR, *supra* note 96.

189. *Id.* at 30.

190. *Id.*; Alfred A. Lindseth, *Legal Issues Related to School Funding/Desegregation*, in *SCHOOL DESEGREGATION IN THE 21ST CENTURY* 41 (Christine H. Rossell, David J. Armor & Herbert J. Walberg eds., 2002).

191. See, e.g., Lindseth, *supra* note 190.

districts' abilities to voluntarily implement integration plans.¹⁹² Although this determination appeared to directly contradict the U.S. Supreme Court's most recent precedents, the SONAR based its conclusion on a prediction that Supreme Court justice retirements would result in a change to the law.¹⁹³ It noted that one 5-4 decision in 1990 "is surely the high water mark for diversity as a justification for racial preference."¹⁹⁴ Tellingly, the SONAR made a concerted effort to downplay the meaning and scope of *Brown v. Board of Education*, stating that the case "did not stand for the proposition that racially segregated schools, without more, are inherently equal."¹⁹⁵ At one point, the SONAR even appears to engage in an extended apologia for segregated schools:

Throughout the United States, such public schools have tackled some of the toughest problems in urban education and been successful. These exemplary schools are located in some of the poorest inner-city neighborhoods, serving student bodies that are largely poor and minority

It is certainly not the intent of the rule to promote racial separatism; however, it is important to understand that a desegregation rule is not unreasonable, or ineffective, simply because some schools may remain racially identifiable.¹⁹⁶

It is impossible to detach the SONAR's substance from the deeply politicized environment that surrounded its release. The state was in the final stretch of a gubernatorial contest. Only three weeks prior to the SONAR's release by the Attorney General's office, Attorney General Skip Humphrey had won the Democratic Party's nomination for the governorship.¹⁹⁷ Several weeks after its release, Bob Wedl, now Commissioner of Education, announced that his new rule would end racial quotas.¹⁹⁸ The day after the new rule was announced, local conservative columnist Katherine Kersten used the issue of integration in a newspaper column to frame the differences between Humphrey and his opponent, Norm Coleman.¹⁹⁹ At a time when virtually all national political figures

192. 1998 SONAR, *supra* note 96, at 17.

193. *Id.*

194. *Id.* (quoting Richard Kahlenberg, *Class Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1039 (1996)).

195. *Id.* at B1.

196. *Id.* at 60–61.

197. *See, e.g.*, Dane Smith & Robert Whereatt, *Coleman, Humphrey Ready for Showdown*, STAR TRIB. (Sept. 16, 1998) [<https://perma.cc/VCK9-9K2P>].

198. *See, e.g.*, Norman Draper, *Plan Would End State's Race Quotas for Schools*, STAR TRIB. (Oct. 6, 1998), [<https://perma.cc/JMF4-4UG7>]; *State Leaders Drafting New Plan for Desegregation in Schools*, ST. PAUL PIONEER PRESS (Aug. 28, 1998), [<https://perma.cc/MUZ6-E6D5>].

199. Katherine Kersten, *Coleman Has a Better Plan for Governing Minnesota*,

were opposed to school desegregation, elevation of the issue in an election season could only augur badly for integration.

The new Minnesota Desegregation/Integration Rule, with the limitations imposed by the SONAR, was finally adopted in early 1999.²⁰⁰ Shortly thereafter, a number of other integration policies in Minnesota schools came under legal attack by White parents, who echoed the SONAR's claim that there was no compelling governmental interest in K-12 integration absent intentional discrimination.²⁰¹ Fearing legal reprisals, many districts abandoned previous integration plans.²⁰² The NAACP lawsuit, after a twisting legal path, concluded in a settlement in 2000.²⁰³ That settlement instituted a voluntary transportation program to help low-income Black children from Minneapolis's North Side attend affluent suburban schools—although some of the most affluent suburban schools refused to opt into the program.²⁰⁴

C. Continuing Conflicts Over Segregation in Minnesota Schools

In the two decades following the implementation of Minnesota's weakened desegregation rule, many of the battles from the 1990s have recurred, sometimes in eerily similar fashion, and even featuring the same cast of characters.

The 1999 rule has failed to stem or slow segregation.²⁰⁵ If anything, the degree of segregation in Minnesota schools has grown sharply.²⁰⁶ As discussed above, this is particularly true of charter schools, which account for a hugely disproportionate share of the state's most racially isolated schools.

Nor have the 1999 rule's legal conclusions withstood the test of time. Most importantly, the rule completely missed the mark with its suggestion that K-12 integration is not, or would be found not to be, a compelling government interest.²⁰⁷ In 2007, the Supreme Court, in *Parents Involved in Community Schools v. Seattle School District No. 1*, confirmed the existence of a compelling government interest in encouraging diversity and

STAR TRIB. (Oct. 7, 1998), [<https://perma.cc/L6Z8-P2RM>].

200. Hobday et al., *supra* note 138, at 958.

201. Orfield, *supra* note 170, at 306.

202. Hobday et al., *supra* note 138, at 965–66.

203. Orfield, *supra* note 170, at 314.

204. *See id.* at 315.

205. Hobday et al., *supra* note 138, at 965.

206. Orfield, *supra* note 170, at 299–300.

207. Hobday et al., *supra* note 138, at 959.

avoiding racial isolation in K-12 education.²⁰⁸ It also reaffirmed the viability of several integration methods, such as the use of flexible racial ratios.²⁰⁹ Justice Kennedy, whose opinion was controlling, wrote passionately in defense of integration:

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.²¹⁰

In similar fashion, the legality of the rule's charter school exemption has been called into question. In 2014, the U.S. Department of Education released guidance strongly suggesting that the exemptions are unconstitutional, because they allow a separate state-supported school district to interfere with and undermine the efforts of the state to integrate a segregated system.²¹¹ The Department's official guidance document declared that "[c]harter schools located in a district subject to a desegregation plan (whether the plan is court ordered, or required by a Federal or State administrative entity) must be operated in a manner consistent with that desegregation plan."²¹²

In 2013, the Minnesota legislature once again focused on school segregation. It enacted yet another statutory provision forbidding segregation, this time at Minn. Stat. § 124D.855:

SCHOOL SEGREGATION PROHIBITED. The state, consistent with section 123B.30 and chapter 363A, does not condone separating school children of different socioeconomic, demographic, ethnic, or racial backgrounds into distinct public schools. Instead, the state's interest lies in offering children a diverse and nondiscriminatory educational experience.²¹³

The legislature also created a policy task force to revise laws governing the use of achievement and integration state aid.²¹⁴ That task force delivered recommendations, including the retention of all

208. See *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

209. *Id.* at 851.

210. *Id.* at 797–98.

211. See Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights at U.S. Dep't of Educ., Regarding Application of Civil Rights Law to Charter Schools (May 14, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf> [<https://perma.cc/UA84-3DQ7>].

212. *Id.* at 3–4.

213. Minn. Stat. § 124D.855 (2020).

214. MINN. DEPT OF EDUC., INTEGRATION REVENUE REPLACEMENT ADVISORY TASK FORCE RECOMMENDATIONS 2 (2012).

existing remedial integration measures.²¹⁵ The legislature enacted these in 2013, as the Achievement and Integration for Minnesota statutes, and gave the state Department of Education authority to make rules for the new law.²¹⁶ Using this authority, the Department attempted to once again revise its desegregation rule.

In 2015, the Department released this new rule for public notice and comment.²¹⁷ The new proposal represented yet another dramatic weakening of the state's integration scheme. It was less than a quarter of the length of the extant 1999 rule, eliminating almost all of the rule's content.²¹⁸ It primarily restated statutory provisions and lacked important definitions—including “racial balance,” which the authorizing statute required.²¹⁹ It eliminated virtually all remedial provisions in the extant rule, and made interdistrict remedies completely voluntary.²²⁰ Despite a statutory instruction to promulgate a rule relating to desegregation/integration, the proposal did not address segregation; it also ignored the statutory requirement to address the need for equal educational opportunities for all students.²²¹ The only significant strengthening provision was the de-exemption of charter schools.²²²

A new SONAR, released in support of the proposed rule, failed to justify most of these changes.²²³ The SONAR claimed that the Department lacked statutory authority to promulgate a broad new rule, but did not explain where it had derived the authority to repeal the vast majority of the existing rule.²²⁴ In addition, Minnesota's administrative procedure laws require promulgating agencies to delineate who will be affected by a proposed rule.²²⁵ The

215. *Id.* at 6 (“The new program must do the following: Develop a new and modern integration rule that is grounded in our state's history and law, is sustainable, but also addresses a new vision that is measured beyond reading, writing and math and includes a more complete measure of achievement and access to opportunity.

i. Maintain language that prohibits intentional segregation in schools.

ii. Maintain current language defining racially isolated districts . . .

iv. Maintain current language defining racially isolated schools.”).

216. Minn. Stat. § 124D.896 (2020).

217. See MINN. DEPT OF EDUC., STATEMENT OF NEED AND REASONABLENESS FOR PROPOSED RULES GOVERNING ACHIEVEMENT AND INTEGRATION FOR MINNESOTA (2015) [hereinafter 2015 SONAR] (explaining the proposed rules introduced in 2015).

218. See *id.*

219. See *id.*; Minn. Stat. § 124D.896 (2020).

220. 2015 SONAR, *supra* note 217, at 31.

221. See *id.*

222. *Id.* at 18.

223. See *id.*

224. *Id.* at 14.

225. Minn. Stat. § 14.05 (2020).

Department of Education dodged this requirement, saying only that “communities” where “achievement and integration plans are presented at public school board meetings which allow for input” would be affected “positively.”²²⁶ No mention of the effects on schoolchildren was made.²²⁷ Indeed, at no point in the rulemaking process did the Department of Education affirmatively state if it expected the rule to reduce racial segregation in Minnesota schools.

The public hearing to the proposed rule generated considerable resistance. Civil rights groups objected to its overall lack of content.²²⁸ Confronted about the lack of policy support for the rule, Department representatives confessed they had made no attempt to model the rule’s impact on the demographic composition of Minnesota schools.²²⁹ The Department also appeared to abandon its earlier position that there is no compelling interest in K-12 integration.²³⁰

Meanwhile, charter schools objected to the proposed elimination of their exemption. Representing the charters was Cindy Lavorato.²³¹ Lavorato, leading the charter opposition, retained Armor and Rossell as experts—just like the state had two decades earlier.²³² The charters included sweeping legal claims denouncing school integration as ineffective and attacking important historic precedent on the issue, like *Swann v. Charlotte-Mecklenburg*.²³³ Lavorato argued that it was important for parents to be able to choose other school features instead of integration, if they wanted: “But not all parents and student [sic] value diversity above all other educational needs. . . . Some families price a premium on - and this was the case for me - small class size and a teacher to student ratio that’s small.”²³⁴

226. 2015 SONAR, *supra* note 217, at 18.

227. *See id.*

228. *See* Inst. on Metro. Opportunity, Comments of the Institute on Metropolitan Opportunity on Proposed Permanent Rules for Achievement and Integration (Jan. 27, 2016).

229. *Id.* at 10.

230. *Id.* at 36.

231. Public Hearing Transcript, *supra* note 168.

232. *See* Memorandum of Law from Charter Schools in Support of the Disapproval of the Minn. Dep’t of Educ. Proposed Desegregation/Integration Rules Due to Four Substantive Defects, Exh. 2–3 (OAH File No. 1300-32227).

233. *See* Inst. on Metro. Opportunity, Comments of the Institute on Metropolitan Opportunity in Reply to Comments Submitted by Charter Schools, Charter Advocacy Organizations, and Charter School Employees on Minnesota Proposed Permanent Achievement and Integration Rule (Feb. 3, 2016) [hereinafter Feb. 3 Reply to Comments].

234. Public Hearing Transcript, *supra* note 168.

At a public hearing, over a dozen charter administrators and representatives spoke.²³⁵ A number of charter administrators affirmatively defended their right to operate racially-targeted schools, arguing that “cultural focus,” in the form of segregation, was necessary because different racial groups think and behave differently.²³⁶ For example, the director of a Hmong-focused charter school stated the following: “Each culture group has their own. The Hmong, we are very quiet. We are introvert[s]. We don’t talk much. The African-American students, they are extrovert[s]. They talk. That’s how they are.”²³⁷

The director of the Excell Academy, which is nearly 100% Black and low-income, relayed messages from the school’s enrollees: “You need to think about what you are doing to people of color and Whites. If you make a White kid go to a colored school or a colored kid go to a White school, there are a lot of things that can go wrong.”²³⁸

The final report disapproved of the entire proposed rule on a variety of grounds.²³⁹ Rather than correct the defects identified by the Administrative Law Judge, the Department of Education abandoned the rule altogether. Although it is still required by statute to adopt new rules that comport with the Achievement and Integration statute, it has not done so.

This failed rulemaking dovetailed with another school desegregation lawsuit against the state of Minnesota, called *Cruz-Guzman v. State of Minnesota*.²⁴⁰ Like the 1995 lawsuit, the new plaintiffs once again argued that the state had ignored constitutional requirements by allowing schools in Minneapolis, St. Paul, and the suburbs to become intensely racially isolated.²⁴¹

Although the lawsuit was filed against the state of Minnesota, a collection of charter schools successfully convinced the state district court to admit them as third-party intervenors.²⁴² They have remained in the suit ever since, continually lobbying the court

235. *See id.*

236. *See id.*

237. *Id.*

238. *Id.* at 159.

239. *See In re Proposed Rules Relating to Achievement & Integration*, OAH No. 65-1300-32227 (2016).

240. *Cruz-Guzman v. State*, 916 N.W.2d 1 (Minn. 2018).

241. Class Action Complaint at 2, *Cruz-Guzman v. State*, 892 N.W.2d 533 (Minn. Ct. App. 2017) (No. 27-CV-15-19117).

242. *See, e.g.*, Rachel M. Cohen, *School Desegregation Lawsuit Threatens Charters*, AM. PROSPECT (Jan. 26, 2016), <https://prospect.org/education/school-desegregation-lawsuit-threatens-charters/> [<https://perma.cc/BE8P-43PV>].

to recognize their right to maintain separate, segregated schools and positing that parent choice is an interest of equal or greater importance than desegregation.²⁴³

In 2018, the *Cruz-Guzman* lawsuit appeared in front of the Minnesota Supreme Court.²⁴⁴ At issue was the preliminary question of whether Minnesota's fundamental right to an education was justiciable.²⁴⁵ The state argued it was not, effectively rendering the fundamental right unenforceable.²⁴⁶ The charter intervenors sided with the state.²⁴⁷ The court, however, sided with the plaintiffs.²⁴⁸ In its decision, it unambiguously held that the Minnesota constitution created justiciable rights for students, and, tellingly, stated that it is "self-evident" that a segregated system of schools could not satisfy the constitutional requirement that schools be "general," "uniform," "thorough," or "efficient."²⁴⁹ The *Cruz-Guzman* suit entered settlement negotiations, where it remains at the time of this writing.²⁵⁰

The nearly 30-year battle over Minnesota desegregation rules has not left the state in a better place. At present, school desegregation in Minnesota is governed by a 1999 rule founded in fundamental legal errors and promulgated in a highly irregular process.²⁵¹ The Department of Education has indicated that it will not act to correct these errors until it receives additional guidance from the legislature, but the legislature has not provided such guidance.²⁵² There is no indication that the political resistance that has impeded all attempts to integrate Minnesota schools for the past four decades will abate soon.²⁵³

243. At the time of this writing, the charter intervenors had most recently failed in a motion seeking to be exempted from the desegregation case. Elizabeth Shockman, *Court Declines to Exempt Charters from School Segregation Case*, MPR NEWS (June 13, 2019), <https://www.mprnews.org/story/2019/06/12/court-declines-to-exempt-charters-from-school-segregation-case> [<https://perma.cc/KK7B-TGAU>].

244. *Cruz-Guzman*, 916 N.W.2d at 1.

245. *Id.* at 4.

246. *Id.* at 7.

247. *See id.*

248. *Id.* at 15.

249. *Id.* at 10 n.6.

250. *See, e.g.*, Eric Golden, *School Integration Plan Awaits Minnesota Lawmaker's Action, May End Up Back in Court*, STAR TRIB. (May 29, 2021), <https://www.startribune.com/school-integration-plan-awaits-minnesota-lawmakers-action-may-end-up-back-in-court/600062764/> [<https://perma.cc/GCG5-UCBE>].

251. *See* Minn. Dep't of Educ., Notice of Withdrawn Proposed Rules Governing Achievement and Integration, Minnesota Rules, ch. 3535, Revisor's ID Number 4309 (March 21, 2016), <https://education.mn.gov/MDE/about/rule/rule/deseg/>.

252. *Id.*

253. *See, e.g.*, Orfield, *supra* note 170, at 301–02 (stating that Minneapolis School

The new mechanisms pioneered by Minnesota to circumvent the integration issue, charter schools and open enrollment, have failed to close education achievement gaps, which remain among the nation's worst.²⁵⁴ Charters have produced endless conflict with public school districts, in Minnesota and nationwide.²⁵⁵ Meanwhile, the charters themselves have become some of the nation's most vocal neo-segregationists. Their early opposition to desegregation has foreshadowed an ever-more-aggressive campaign for "culturally focused" education, and explicit denunciations of integration as unnecessary or even harmful.²⁵⁶ Several Minnesota charter advocates have built national profiles as defenders of *de facto* school segregation—or even *intentional* segregation, under the aegis of "cultural affirmation."²⁵⁷

In the meantime, the wellbeing and education of tens of thousands of Minnesotan children is at risk, as the laws of their state steer them towards segregated schools.

III. The Rise and Fall of Regional Housing Planning

In the late 1960s and early 1970s, Minnesota was a national leader in regional planning. The state established a system to ensure that its core metropolitan region was overseen by a single government that could align metro-wide policies in a holistic, comprehensive, and mutually beneficial fashion.²⁵⁸

In most states, major cities are fractured into dozens of municipalities, each operating independently of each other—a recipe for destructive, zero-sum competition, demographic and economic fragmentation, and ultimately, residential exclusion.²⁵⁹ The inability to construct unified regional housing policy is a recipe

District enrollment continues to plummet while students instead attend problematic charter schools).

254. *See id.* at 269–70.

255. *See, e.g.*, Feb. 3 Reply to Comments, *supra* note 233 (detailing the debate surrounding charter schools).

256. *See, e.g.*, Robert Wedl & Bill Wilson, *In Minnesota, We Must Think Broadly About School Integration*, STAR TRIB. (Dec. 31, 2015), <https://www.startribune.com/in-minnesota-we-must-think-broadly-about-school-integration/363960211/> [https://perma.cc/LM6U-TVUA].

257. *See, e.g.*, Chris Stewart, *Our Obsession with Integration Is Hurting Kids of Color*, WASH. POST (June 10, 2016), <https://www.washingtonpost.com/news/in-theory/wp/2016/06/10/our-obsession-with-integration-is-hurting-kids-of-color/> [https://perma.cc/X75X-HSUT].

258. Myron Orfield & Will Stancil, *Why Are the Twin Cities So Segregated?*, 43 MITCHELL HAMLINE L. REV. 1, 9–10 (2017).

259. *See* DAVID RUSK, CITIES WITHOUT SUBURBS (2013) for a discussion of urban fragmentation.

for the emergence of the classic urban-suburban divides that were stereotypical of American cities in the 20th century, with white-picket-fence suburbs doubling as gated enclaves, built to exclude the poor and the non-White, both explicitly and implicitly.

Minnesota developed a better system. Although the Twin Cities are divided among many municipalities, those municipalities are subject to the authority of a regional government, the Metropolitan Council, which has been given the tools to corral them.²⁶⁰ This metropolitan government for the Twin Cities area, known as the Met Council, has a well-established and robust state law authority to coordinate regional policy.²⁶¹ The Met Council adopted a metropolitan land use policy requiring all suburbs provide for their fair share of affordable housing.²⁶² Minnesota enacted a regional property tax base sharing act.²⁶³ In upholding this act, the Minnesota Supreme Court declared the constitutional interdependency of Minneapolis and its suburbs.²⁶⁴ By the early 1980s, the Twin Cities was one of the most integrated communities in the nation, with some of the smallest racial disparities.²⁶⁵

The Met Council of the Twin Cities was also at the vanguard of metropolitan civil rights and federal Fair Housing Act enforcement. The Council supervised the U.S. Department of Housing and Urban Development's (HUD's) Section 8 program and was given authority to tie grants of state and federal funds to actual progress on economic integration.²⁶⁶ In most places, subsidized housing was rejected by affluent suburbanites, and segregated into impoverished urban neighborhoods.²⁶⁷ The Met Council broke this pattern. By 1979, 70% of subsidized housing in the Twin Cities was constructed in the predominantly White developing communities of the suburbs—a record of integrated housing placement that has never been equaled in any major metropolitan area.²⁶⁸

260. See Orfield & Stancil, *supra* note 258, at 27–28.

261. *Id.* at 10.

262. *Id.*

263. See *Fiscal Disparities*, METRO. COUNCIL, <https://metro council.org/Communities/Planning/Local-Planning-Assistance/Fiscal-Disparities.aspx> [<https://perma.cc/QX5K-23Y9>].

264. See *Village of Burnsville v. Onischuk*, 222 N.W.2d 523 (Minn. 1974).

265. Orfield & Stancil, *supra* note 258, at 10.

266. See 42 U.S.C. § 3608; *Metro HRA Rental Assistance*, METRO. COUNCIL, <https://metro council.org/Housing/Services/Metro-HRA-Rental-Assistance.aspx> [<https://perma.cc/BK6T-PHYN>].

267. Orfield & Stancil, *supra* note 258, at 22.

268. *Id.*

But the progress did not last. The Council caved under political pressure from the central cities and housing industry and returned to old, segregative patterns of development.²⁶⁹ Many of the Met Council's pioneering practices were slowly abandoned—at least in practice, if not in the letter of the law.²⁷⁰ In doing so, the Council unilaterally limited its own role in housing. Rather than coordinating housing development activity throughout the region, it now restricts its work to a handful of comparatively paltry funding sources over which it exercises direct control, and participation in a number of public-private “partnerships,” largely with housing developers.²⁷¹ Under the Council's watch, local governments have abandoned integrative planning with a regional perspective.²⁷² They have reverted to segregative practices, creating a region in which exclusionary zoning reigns and lower-income housing is locked out of many communities.²⁷³ While some communities have taken actions that reduce housing choice, and others are forced to bear the burden of runaway demographic transition, the Council has retreated.²⁷⁴

Worse still, the Council's more recent activities have promoted, rather than disrupted, the traditional concentrations of poverty and segregation in the central cities.²⁷⁵ Its own funding sources have been distributed in a segregative fashion, with a disproportionately heavy emphasis on the central cities, and its negotiated housing goals have reduced the obligation of the region's Whitest communities to provide affordable housing.²⁷⁶ It has embedded housing elements into its plans for other metropolitan systems like transportation—but only to encourage the development of lower-income housing along transit corridors, which are located almost exclusively in the central cities and less-affluent suburbs.²⁷⁷

The fields of housing and planning, once understood as a core civil rights concern where decisions could impact living patterns for

269. *Id.* at 37–47.

270. *Id.*

271. *Id.* at 47–54.

272. *Id.*; see also Edward G. Goetz, Karen Chapple & Barbara Lukermann, *Enabling Exclusion: The Retreat from Regional Fair Share Housing in the Implementation of the Minnesota Land Use Planning Act*, 22 J. PLAN. EDUC. & RSCH. 213, 217–18 (2003).

273. See Orfield & Stancil, *supra* note 258, at 27–30.

274. See *id.* at 43–44.

275. See *id.* at 26–27.

276. See *id.* at 42–44.

277. *Id.* at 48–49.

decades, are now dominated by parochial development interests and neighborhood activists. These include representatives from affluent and exclusionary suburbs, but also organizations working in the poorest quarters of the Twin Cities metropolitan area, where housing policy is dominated by the interest of nonprofit and public institutions that rely on the segregated status quo.²⁷⁸

A. *The Met Council's Broad Authority to Seek Housing Integration*

Just as riots throughout the country in the late 1960s led to the Kerner Commission Report and ultimately to the passage of the Fair Housing Act, serious civil disturbances in North Minneapolis and growing racial segregation in both central cities' school systems were driving forces behind the Council's fair share housing policy.²⁷⁹ The Council believed that racial segregation was destroying the education and economic prospects of Black citizens in North Minneapolis, the fabric and vitality of their neighborhoods, and that growing racial and social segregation, left unchecked, would harm the economic vitality of the entire metropolitan area.

In the mid-1970s, the Council sought to establish a staged growth land planning system. It hired the renowned land use scholar, Robert Freilich, to design a new Metropolitan Land Planning Act for submission to the Minnesota legislature.²⁸⁰ From the outset it was clear the Act would contain a "fair share" housing requirement, for Freilich believed that the staged growth system the Council wanted would be unconstitutional without it.²⁸¹ In January of 1974, Freilich produced a report to the Met Council outlining the proposed act and its fair share provisions.²⁸²

Freilich grounded his "fair share" proposals in explicit goals already announced by the Council, the requirements of the

278. *Id.* at 3.

279. *Cf. id.* at 21–22 (discussing implementation of the fair share goal and citing integration as a key motivating factor).

280. Robert H. Freilich & John W. Ragsdale, Jr., *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009, 1009 n.1 (1974) ("This Article is the result of a 1972-73 grant from the Twin Cities Metropolitan Council to Professor Freilich to study and recommend a legal policy for regional growth in accordance with the Council's decision to pursue growth in a timed and sequential manner.").

281. *Id.* at 1086 ("Whatever the methods used, the region must make extensive provision for low-moderate income housing or face the grave danger that a general regional planning system of growth control will be subject to strict scrutiny and declared unconstitutional as violating the equal protection of the laws.").

282. *Id.* at 1009 n.1.

Federal Fair Housing Act, and the evolving case law prohibiting exclusionary zoning.

In its early planning documents, the Council highlights the importance of housing choice and desegregation. It defines the “Social Objectives of Physical Planning” to include:

1. To increase choice and opportunity for persons in the Metropolitan area, particularly people who are in some way disadvantaged, such as low income, minorities, senior citizens, etc.
2. To decrease residential segregation by race, class, and income level. To reduce the concentration of lower income families and individuals in the older areas of the region and increase housing choice for lower income persons throughout the area.²⁸³

After having achieved its full authorities under the Minnesota Land Use Planning Act, the Met Council had at its disposal an arsenal of powerful tools to shape, guide, and enforce local housing policies. These tools included the authority to:

- Review local applications for state and federal funding based on housing performance.²⁸⁴
- Award funds directly under its control on the basis of housing performance, including:
 - Sewer funds
 - Park funds
 - Transportation funds.
- Suspend state agency plans inconsistent with Council policies.²⁸⁵
- Suspend local comprehensive plans, which could include the mandatory housing element, if they do not conform with systems plans.²⁸⁶
- Embed housing elements into system plans.²⁸⁷
- Suspend any matter of metropolitan significance undertaken by a local government.²⁸⁸

283. Metro. Council, Discussion Statement on Metropolitan Development Policy 7 (Oct. 1973).

284. MINN. STAT. § 473.171 (2020).

285. See MINN. STAT. § 473.165 (2020).

286. See MINN. STAT. § 473.175 (2020).

287. See MINN. STAT. § 473.146 (2020).

288. MINN. STAT. § 473.173 (2020).

- Form collaborative review agreements with state agencies, including the state housing finance agency.²⁸⁹
- Review housing bonding plans.²⁹⁰

The Council also planned to rely on its suburban integration efforts to receive supplementary funding from HUD, which offered special allocations to metropolitan areas operating fair share housing plans.²⁹¹ On the basis of its promise to maintain a racially integrated regional fair housing program, the Council requested, and received, a 50% supplemental Section 8 allocation from HUD in both 1976 and 1979—almost twice the allocation received by any other region. It also received further support when its Areawide Housing Opportunity Plan, which encompassed its housing program, was certified for extra funding from HUD in 1976.²⁹²

B. The Council Promotes Housing Choice and Integration

In response to clear internal and external directives, the Council in the early 1970s used its state law powers to adopt and enforce a series of policies to improve racial and economic integration. It did so by ensuring that subsidized housing was produced in suburban communities.

The centerpiece of these was Policy 13—later renamed Policy 39—which, in the words of contemporaneous reports, “stated that in reviewing requests from a local community for state or federal grants that priority for such requests would be given based on the community’s housing performance.”²⁹³ This method of prioritization meant that “applications for parks, sewers, water, highway construction, open space, aging and criminal justice funds [were] prioritized according to not only the merits of the application itself, but also on the community’s plans and performance for providing housing for low and moderate income persons.”²⁹⁴

In addition, the Metropolitan Land Planning Act, which was passed in 1976, empowered the Council to create numerical housing allocations for communities within its jurisdiction.²⁹⁵ It could then

289. MINN. STAT. §§ 473.165, 474.173 (2020).

290. See MINN. STAT. § 473.173 (2020).

291. See, e.g., Letter from John Boland, Chairman of the Metropolitan Council, to James L. Young, HUD Assistant Secretary for Housing (July 6, 1976).

292. BERKELEY PLAN. ASSOCS., ASSESSMENT OF THE IMPACT OF THE HOUSING OPPORTUNITY PLAN (AHOP) PROGRAM III-7 (1979).

293. TRUDY PARISA MCFALL, A REGIONAL HOUSING STRATEGY: FROM PLANS TO IMPLEMENTATION 8 (1975).

294. *Id.*

295. See MINN. STAT. § 473.859 subd. 2(c) (2020) (“A land use plan shall also include a housing element containing standards, plans and programs for providing

review local comprehensive plans to ensure that they were in compliance with allocated goals.²⁹⁶ The Council was granted the authority to temporarily suspend plans that did not comply with its systems plans;²⁹⁷ these systems plans complemented and incorporated the housing allocations through the use of density goals and similar measures of housing performance.²⁹⁸

These policies were remarkably successful at promoting fair housing; over the course of the 1970s the geographic distribution of subsidized housing in the Twin Cities changed dramatically. In 1970, 90% of Twin Cities subsidized housing was located in the central cities; by 1979, nearly 40% of units were in suburban communities.²⁹⁹ In some of the intervening years, the proportion of new units built in the suburbs approached or exceeded 70% of the regional total.³⁰⁰ Likewise, while only 16 of the region's 189 municipalities contained any subsidized housing at all in 1970, that number had grown to 97 by the end of the decade.³⁰¹ In under a decade, the total number of units in the suburbs increased nearly eight-fold, from 1,878 in 1971 to 14,712 in 1979.³⁰² Nine thousand four hundred, or 70%, of the over 13,000 units added in this period were located at the developing edge of the suburbs.³⁰³ An examination of the comprehensive plans of twenty-five sample communities shortly after the passage of the Metropolitan Land Planning Act found that over 7,463 parcels of land, totaling 8,590 acres, had been set aside for high density affordable housing.³⁰⁴ In short, through dedicated effort, the Metropolitan Council

adequate housing opportunities to meet existing and projected local and regional housing needs, including but not limited to the use of official controls and land use planning to promote the availability of land for the development of low and moderate income housing.”).

296. MINN. STAT. § 473.858 subd. 1 (2020).

297. See MINN. STAT. § 473.175 (2020).

298. See MINN. STAT. § 473.859 subd. 1 (2020).

299. Orfield & Stancil, *supra* note 258, at 22–23.

300. *Id.* at 22.

301. *Id.* at 22–23.

302. See METRO. COUNCIL, HOUSING OPPORTUNITY IN THE TWIN CITIES: A STAFF BACKGROUND REPORT ON THE LOCAL AND REGIONAL RESPONSE 1967-1978, at 3 (1978) [hereinafter STAFF BACKGROUND REPORT].

303. *Id.*; INST. ON METRO. OPPORTUNITY, COMMENTS ON SECOND DRAFT FAIR HOUSING EQUITY ASSESSMENT 28–29 (Feb. 28, 2014) [hereinafter SECOND DRAFT COMMENTS].

304. Edward G. Goetz, Karen Chapple & Barbra Lukermann, *The Minnesota Land Use Planning Act and the Promotion of Low- and Moderate-Income Housing in Suburbia*, 22 LAW & INEQ. 31, 40 (2004); SECOND DRAFT COMMENTS, *supra* note 303, at 28.

substantially and meaningfully opened many of the suburbs to lower income families.

Writing in 1975, the manager of the Council's housing program noted that "[t]he most pervasive characteristic of housing patterns in virtually all major metropolitan areas is that of socioeconomic and racial residential segregation."³⁰⁵ In light of this fact, "[t]he Council has been chiefly concerned with locating subsidized housing in well serviced suburban locations."³⁰⁶ Council documents rigorously tracked progress towards altering the distribution of subsidized housing between the suburbs and central cities; for example, the table below, reproduced from a Council housing report, depicts the rapid suburbanization of subsidized units.³⁰⁷

305. MCFALL, *supra* note 293, at 1–2.

306. *Id.* at 4.

307. SECOND DRAFT COMMENTS, *supra* note 303, at 30.

Subsidized Housing in the Twin Cities in the 1970s

Year	Region	Central Cities		Suburbs	
	New Units	New Units	Share	New Units	Share
1971-72	4,139	2,668	64%	1,471	36%
1972-73	2,147	1,083	50%	1,064	50%
1973-74	917	504	55%	413	45%
1974-76	5,363	2,029	38%	3,334	62%
1977	4,657	1,255	27%	3,402	73%
1978	2,099	831	40%	1,268	60%
1979	2,329	724	31%	1,605	69%
Totals	21,651	9,094	42%	12,557	58%

Cumulative Totals of Subsidized Housing

(includes units provided before 1971)

Year	Region	Central Cities		Suburbs	
	Total Units	Total Units	Share	Total Units	Share
July, 1971	18,736	16,858	90%	1,878	10%
July, 1973	24,202	19,877	82%	4,325	18%
July, 1974	25,013	20,414	82%	4,599	18%
Dec., 1976	27,986	20,118	72%	7,868	28%
Dec., 1977	31,851	21,060	66%	10,791	34%
Dec., 1978	34,650	21,891	63%	12,759	37%
Dec., 1979	37,268	22,556	61%	14,712	39%

Family Housing

Year	Region	Central Cities		Suburbs	
	Total Units	Total Units	Share	Total Units	Share
pre-1975	11,957	8,367	70%	3,590	30%
1975-76	3,578	1,537	43%	2,041	57%
1977-79	2,022	10	0%	2,012	100%

Remarkably, documents from the period indicate that the Council confronted, overcame, and eventually transformed political resistance to integration in the suburbs. At the outset, suburban communities were skeptical of the Council's housing policies—for instance, one staff report describes initial reactions “of anger, hostility, and frustration” from suburbanites.³⁰⁸ But the agency remained dedicated to the principle of providing housing choice and opportunity, noting in the same report that “the available evidence strongly suggests that minority populations would like a far broader opportunity for suburban and rural living than they presently

308. METRO. COUNCIL, STAFF BACKGROUND REPORT, *supra* note 302, at 2.

have.”³⁰⁹ Moreover, the Council defended its authority to pursue that outcome, noting that its “review role [for funding] is an invaluable tool for implementing policy.”³¹⁰

Ultimately, the Council’s determination paid off, and a number of the suburbs accepted or even embraced the goals of suburban integration. For instance, a 1979 report on the region’s housing policy describes the extraordinary efforts of Edina, one of the region’s wealthiest suburbs, to comply with its housing requirements (efforts which were undermined by HUD itself):

The most extreme case we heard of was Edina’s valiant effort to use one of its last remaining parcels (on its boundary) for family subsidized housing. It used CDBG funds for land write-downs, held developers’ hands, got city council approval, and submitted the proposal (demand by the Metro Council’s allocation plan) to HUD, which turned down the project on the grounds of “impaction of family housing” although Edina, the most affluent suburb in the metropolis, had only one other subsidized family project, and the proposed density was only nine units per acre. The Edina planner fears . . . the city will be left out of compliance with the regional plan.³¹¹

The same report describes many successful instances of cooperation with suburban communities to produce subsidized and lower-income housing.³¹²

C. *Retreat and Reversal*

Today, as the result of a combination of political timidity and capitulation to special interests, the Council has unraveled virtually all of its previous progress towards housing integration.

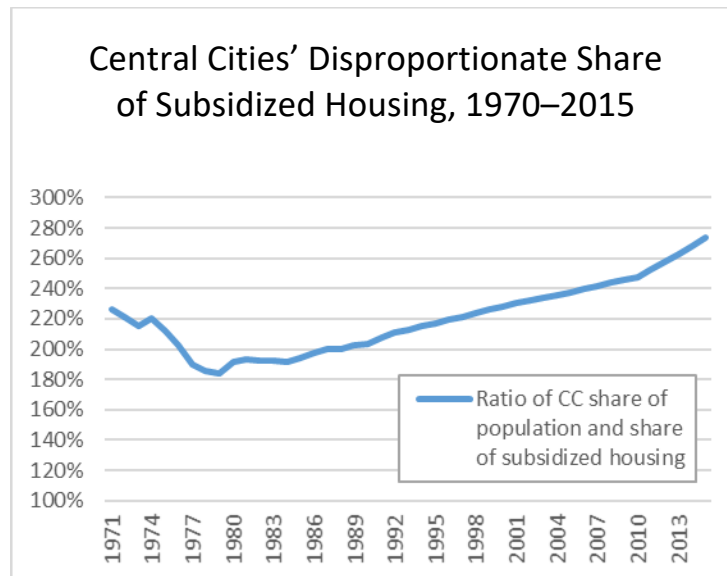
309. *Id.*

310. *Id.*

311. BERKELEY PLAN. ASSOCS., *supra* note 292.

312. *Id.*

After the 1970s, the Council's efforts to integrate subsidized and affordable housing into the suburbs began to stagnate. The suburban share of subsidized housing reached approximately 42% in the mid-1980s and has not significantly changed since.³¹³ Meanwhile, as sprawl has progressed and the region has grown, the central cities' share of regional population has continually shrunk.³¹⁴ As a result, the oversupply of subsidized housing in the central cities, as compared to their proportion of population, has worsened continually since 1980. Today, the mismatch between share of population and share of housing in the central cities is actually far worse than it was before the Council's integration efforts began in earnest in 1970 (see the chart below).³¹⁵



The causes of this reversal are complex, but two factors have played a key role. First, political actors, particularly housing interests and central city governmental agencies, have battled to retain housing funding. Second, there have been marked policy

313. Orfield & Stancil, *supra* note 258, at 22–23.

314. Greta Kaul, Minneapolis Is Growing at its Fastest Rate Since 1950, *MinnPost* (May 23, 2018), <https://www.minnpost.com/politics-policy/2018/05/minneapolis-growing-its-fastest-rate-1950/> [<https://perma.cc/6ZM4-UJGU>].

315. Data obtained from Orfield & Stancil, *supra* note 258, at 6.

changes at the Council itself, which has deemphasized the very housing policies it once strictly enforced.

Concern among central city political circles and development interests about the loss of funding is readily apparent in the historical documentary record. As early as 1975, the manager of the Council's housing program was reporting pushback arising out of worries over funding:

The major issue which has arisen around the allocation plan has been the number of units which have been allocated to the center cities of Minneapolis and St. Paul; the plan directs that they should receive 16 and 12 percent of the available funding. City officials have argued that this is inadequate to meet their needs, slows their urban renewal efforts, and inadequately provides for relocation needs. The Council has, however, remained firm in its intention to carry out its plan to increase the supply of low income housing in suburban areas.

That center city resistance should be the major issue surrounding the plan was surprising to us, but it certainly is understandable. Large and sophisticated housing authorities exist in the cities. . . . They have further relied heavily on subsidized housing to turn over the land cleared through urban renewal. Reduction of their programs through redirection of subsidy funds causes considerable problems and adjustments.³¹⁶

Although this report was released before the passage of the Metropolitan Land Planning Act and subsequent creation of a numerical fair share plan, a 1979 report, commissioned by HUD to evaluate the region's areawide housing plan, makes clear that resistance continued and stiffened over time, resulting in demands for a higher housing allocation from the central cities. For instance, one section describes the political relationship between cities and suburbs:

[T]he very success of the regional housing allocation plan has generated some discord among the multiple institutions dedicated to housing In the plan's early stages, the central cities – with 90% of the region's assisted housing – were eager for the suburbs to take on some of the burden. Now they feel dispersion may have gone too far, that central cities need more of the scarce housing resources.³¹⁷

The report elaborated further on the pressures on the Council to abandon its integration efforts:

The pressures to relax the plans aggressive fair share distribution comes from several sources. Most significantly, perhaps, the HUD area office At the same time the central

316. MCFALL, *supra* note 293, at 12.

317. BERKELEY PLAN. ASSOCS., *supra* note 292, at III-11.

cities of Minneapolis and St. Paul are retreating from their support of the [areawide plan]. St. Paul, the more economically depressed, had never been as an enthusiastic [plan] supporter as its Twin City, and is now seeing considerable redevelopment promoted by an aggressive director of a highly centralized organization directly under the mayor. In this situation, St. Paul understandably seeks a larger share of subsidized housing, citing arguments such as relocation needs, gentrification, and that the [areawide plan's] "white flight" assumption is akin to generals fighting the last war . . . [B]oth central cities are looking for larger percentage shares of subsidized housing in any revisions of the regional allocation plan.³¹⁸

The result of these various pressures has been a marked change in the Council's priorities, and with it, a failure to enforce many of its own previous policies. The waning of political will to maintain the Council's housing policies is intrinsically linked to the growth of segregation in the region, as noted in one 2004 study:

Two important changes in the socio-political environment of the Twin Cities region also undermined the state's commitment to fair share housing during the second wave. The first change was a reduction in gubernatorial support for an interventionist Met Council. Democrat Rudy Perpich and his successor, Republican Arne Carlson, both expressed little interest in metropolitan planning, especially in the area of low-mod housing, and neither advanced policies to strengthen Met Council. The second change was a demographic shift in the region. At the same as more people of color moved to the area, greater concentrations of poverty and attendant social problems emerged in core neighborhoods. The social and economic homogeneity that had been the foundation of almost two decades of regional problem-solving began to disappear. With it went the language of regional commitment to low-cost housing needs under the fair share method.³¹⁹

The same study analyzed the interaction between Council policies and the comprehensive plans of twenty-five communities.³²⁰ It found that, after the Council began aggressively enforcing its need allocations in the late 70s, "[t]he first round of plans addressed both the local and regional needs by referencing the fair share allocation established by Met Council."³²¹ The influence of the Council's policies are clear in the plans themselves, with "[s]ome plans even indicat[ing] that the regional allocation system was the

318. *Id.* at III-4, III-5.

319. Goetz et al., *supra* note 304, at 46 (footnotes omitted).

320. *Id.* at 40.

321. *Id.* at 48.

best way to determine local needs.”³²² These plans “routinely acknowledge the local regulatory options to overcoming barriers to low-cost housing development.”³²³ Once again, suburban cooperation is a key theme: “the Apple Valley, Inver Grove Heights, and Eagan plans each contain language stating that housing needs are best established on a regional basis.”³²⁴

But after the Council’s commitment to integration subsided, cities felt free to ignore the fair share system. According to the study’s authors, “[n]ot a single plan submitted later than 1990 . . . identified the local share of regional low [and moderate income] housing needs,” and “[w]ith the exception of two communities, none of the later plans identified existing or projected low-mod housing needs at all.”³²⁵ Later plans “are generally bereft of specific statements outlining regulatory steps;”³²⁶ for instance, an Inver Grove Heights plan only states that “[t]o the degree possible, the City will work to ensure that local actions do not unduly increase the cost of raw land.”³²⁷ The regionally-oriented language also vanished from the suburban plans, replaced by defiant assertions of local control:

[I]n its place [was] language asserting each community’s role in establishing housing goals. The 1999 plan for Apple Valley, for example, states that “[t]he City is in the best position to determine the most responsible option for meeting the future needs of Apple Valley rather than the Metropolitan Council, especially as it relates to residential densities.”³²⁸

The 2004 study determined that these changes reflected a broader retreat from any consideration whatsoever of low-income housing in city planning:

Five [cities] indicated that they do not calculate low-mod housing need in any way. One city planner said her community does not calculate need because it “is a factor of the marketplace and changes periodically and regularly with the market.” In another community, the planner indicated, somewhat paradoxically, that they do not calculate need because they have determined that it is zero.³²⁹

322. *Id.* at 48–49.

323. *Id.* at 55.

324. *Id.* at 49.

325. *Id.* at 48.

326. *Id.* at 55.

327. *Id.* at 57 (quoting CITY OF INVER GROVE HEIGHTS, INVER GROVE HEIGHTS COMPREHENSIVE PLAN-DRAFT 7 (1998)).

328. *Id.* at 49 (third alteration in original) (footnotes omitted) (quoting CITY OF APPLY VALLEY, COMPREHENSIVE PLAN UPDATE DRAFT 60 (1999)).

329. *Id.* at 50 (footnotes omitted) (quoting Interview by Leigh Tomlinson with Pam Dudziak, City Planner, City of Eagan, in Eagan, Minn. (June 29, 2001)) (citing

The Council's changing priorities are reflected in its own reports. As late as 1996, its Regional Blueprint discussed suburban housing integration, even noting the lack of progress over the previous decade.³³⁰ But by 2004, the Blueprint omitted any discussion of the subject at all, instead only stating that “[t]he region will, of course, need much more housing in the next 30 years,” and emphasizing the importance of “public-private partnerships” in expanding housing supply.³³¹

These changes are all the more remarkable because the Council still retains the same authorities it had used to promote housing integration in previous decades.³³² In the mid-1990s, there were legislative efforts to force the Council to utilize its authorities more broadly (several of which were directed by Myron Orfield, an author of this article, who was at the time serving in the state House of Representatives).³³³ The legislature twice passed a statute that would force a return to strong fair-share policies and would require the council to withhold other forms of financial aid from noncompliant cities.³³⁴ Each bill was vetoed by Governor Arne Carlson.³³⁵

In 1995, a compromise measure, the Livable Communities Act (LCA), was passed and was signed into law.³³⁶ This law did not contain the clear mandates of the previous effort, instead relying on voluntary, incentive-based development funding for regional jurisdictions.³³⁷ Although the LCA in no way altered or reduced the

Interview by Jill Mazullo and Mudia Ouzzi with Howard Blin, Plan. Dir., and Stacie Kvilvang, Econ. Dev. and Hous. Planner, City of Brooklyn Park, in Brooklyn Park, Minn. (Dec. 11, 2000).

330. METRO. COUNCIL, REGIONAL BLUEPRINT 59 (1996).

331. METRO. COUNCIL, 2030 REGIONAL DEVELOPMENT FRAMEWORK 13 (2004).

332. See, e.g., Minn. Stat. § 473.175 (2020) (granting the Metropolitan Council the ability to review comprehensive local plans).

333. See Dane Smith, *House Committee Approves Met Council Bill, Members Would Be Elected Instead of Being Picked by Governor*, STAR TRIB., Mar. 25, 1997, at B3 [hereinafter *House Committee*] [<https://perma.cc/9RFL-JWFL>]; Patricia Lopez Baden, *Tax-Sharing Bill Fails in Close Senate Vote, Plan Would Pool Revenues in Metro Area*, STAR TRIB., May 10, 1995, at 1B [<https://perma.cc/R9S9-ZR5V>]; Dane Smith, *House Again OKs Orfield Housing Bill; Carlson Set to Veto*, STAR TRIB., Apr. 23, 1994, at 1B [hereinafter *House OKs Orfield*] [<https://perma.cc/6VE5-LTLA>].

334. See *House OKs Orfield*, *supra* note 333.

335. See *id.* (“[T]he bill is almost certain to be vetoed by Gov. Arne Carlson.”); Baden, *supra* note 333 (describing Governor Carlson’s opposition to the tax shifting bill); see also *House Committee*, *supra* note 333 (“However, Gov. Arne Carlson is still opposed to an elected council. Spokesman Brian Dietz said Carlson considers it ‘veto material.’”).

336. See Metropolitan Livable Communities Act, ch. 255, 1995 Minn. Laws 2592 (codified as Minn. Stat. §§ 473.25–437.255).

337. Goetz et al., *supra* note 304, at 46–47.

Council's previously exercised powers, and was in fact intended to jumpstart the integrative processes that had been stalled since the previous decade, it was quickly used to justify the Council's changing priorities.³³⁸ Suburban leaders argued, incorrectly, that the Council's previous legal authority "was superceded [sic] by the LCA."³³⁹

Once again, the Council's failure to enforce its policies allowed exclusionary practices to take root:

Even though LCA benchmarks are low, many communities negotiate with Met Council to lower their goals even further. The 1998 plan for Lino Lakes, for example, provides no calculations of existing or projected need for low-mod housing, nor the City's share of the regional need for such housing. The plan references LCA goals, and notes that the goals for homeownership are to slightly reduce the rate at which affordable housing is produced in the City, and to slightly increase the rate at which affordable rental housing is developed. Even with the increase in affordable rental housing, Lino Lakes has adopted a goal that is ten to twenty-three percentage points below the benchmark provided to them by Met Council. Oakdale, Shoreview, and Prior Lake have also adopted goals below the provided benchmarks.³⁴⁰

The lopsided LCA benchmarks have resulted in even-more-lopsided funding outcomes.³⁴¹ Of the more than 14,000 housing units subsidized by LCA funding during the program's history, 49.8% have been located in the central cities of Minneapolis and St. Paul, which contain only 24.7% of the region's housing and a majority of its concentrated poverty and segregation.³⁴² Most of these allocations occurred under the previous set of benchmarks. But as Table Two demonstrates, when new benchmarks were negotiated, the Council worked not to arrest this trend, but instead accelerated it by giving the central cities higher goals.³⁴³

It remains unclear to this day exactly when and how the bold fair share policies of previous decades were eliminated at the Met Council. The best evidence suggests they were abandoned by piecemeal nonenforcement in the 1990s, seemingly out of the same concern over suburban backlash that had resulted in the gutting of

338. See Orfield & Stancil, *supra* note 258, at 42–43.

339. Goetz et al., *supra* note 304, at 51 (quoting Interview by Jill Mazullo with John Heald, Cmty. Dev. Dir., City of Savage, in Savage, Minn. (Nov. 29, 2000)).

340. *Id.* at 53–54 (footnotes omitted).

341. Data on LCA funding was analyzed by the Institute on Metropolitan Opportunity at the University of Minnesota. Underlying datasets are on file with authors.

342. *Id.*

343. See *infra* note **Error! Bookmark not defined.**

Minnesota's school desegregation rule.³⁴⁴ Notably, some of the same figures crop up: Lee Sheehy, the Deputy Attorney General who had presided over the school rule's evisceration, became regional administrator at the Met Council in the early 2000s, where he oversaw much of the day-to-day operations of the agency.³⁴⁵

In the 2010s, under the Obama administration, the federal government began to refocus on questions of integration and segregation. These changes most notably took the form of a raft of new civil rights rules, including a Discriminatory Effect rule formalizing the Fair Housing Act's bar against the perpetuation of segregation and an Affirmatively Furthering Fair Housing Rule requiring some local jurisdictions to take affirmative steps to create integrated housing.³⁴⁶

However, the Met Council's housing policy efforts in the 2010s continued to reduce the role of integration in the agency's policies. In 2010, the Council was awarded a \$5 million HUD grant under the national Sustainable Communities program, a federal effort to coordinate housing and transit planning.³⁴⁷

As a component of its Sustainable Communities grant, the Council was required to complete an "equity assessment," essentially identifying high-poverty and high-opportunity areas within the region and analyzing how those policies interacted with public investment and fair housing issues.³⁴⁸ The Council's completed assessment, however, exhibited the influence of its integration-skeptical consultants and largely minimized the subject of segregation. Although it identified areas of concentrated poverty as required by grant terms, it did not articulate any real strategy for eliminating the segregation in those areas.³⁴⁹ In addition, it conducted an assessment of neighborhood opportunity that acted as

344. Despite repeated requests, the Met Council has never provided authors or any other agency documentation of a specific decision to begin nonenforcement of these policies. See Orfield & Stancil, *supra* note 258, at 42–44 for additional discussion.

345. Brady Averill, *Klobuchar Picks Sheehy as Her New Chief of Staff*, STAR TRIB., May 19, 2007, at 11A [<https://perma.cc/2MDT-Q8VS>].

346. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100); Affirmatively Furthering Fair Housing Rule, 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

347. See Twin Cities Metropolitan Sustainable Communities Regional Planning Program, Application to HUD 2 (August 22, 2010).

348. METRO. COUNCIL, *Executive Summary: About this Summary, in CHOICE, PLACE, AND OPPORTUNITY: AN EQUITY ASSESSMENT OF THE TWIN CITIES REGION*, at III–IV (2014).

349. See *id.* (explaining criteria for Racially Concentrated Areas of Poverty).

a virtual apology for neighborhood segregation. Communities in the Twin Cities region were classified into opportunity tiers.³⁵⁰ But rather than array those tiers from high to low, the Council's equity assessment identified advantages and disadvantages for each tier, making them appear in many respects equivalent. For instance, affluent suburban areas were identified as having "[a]bove average school performance" but "[l]ow access to social services," while segregated central city areas were described as having "[h]igh access to social services" but "below average school performance."³⁵¹

Simultaneously, the Met Council was working on a renewed Housing Policy Plan for the region, the first formal update of its housing plan in nearly 30 years.³⁵² The plan it developed, which was adopted in 2014, echoed the ideas of the equity assessment.³⁵³ It formally eliminated Policy 39 conditioning funding on housing performance, which had last been articulated in 1985.³⁵⁴ Remarkably, despite the federal efforts to re-center housing segregation, the new Housing Policy Plan all but ignored the topic. Indeed, it only mentions the word four times: once describing future challenges for the region, once in a description of the equity assessment, and twice in a description of President Obama's new affirmatively further rule—which it otherwise ignored.³⁵⁵

The new housing plan updated the regional "housing need" calculation for every jurisdiction, and also updated LCA benchmarks for housing construction.³⁵⁶ In the most recent set of LCA goals, nearly every subset of communities was permitted to adopt a benchmark far below their allocated regional need—except the central cities, which were explicitly required to adopt a benchmark that was 100% of their allocated need. The central cities

350. METRO. COUNCIL, *Section Six: Opportunity in the Region*, in CHOICE, PLACE, AND OPPORTUNITY: AN EQUITY ASSESSMENT OF THE TWIN CITIES REGION 2–3 (2014). ("A second shortcoming of the [Cumulative Opportunity] Index is that it categorizes communities as either low or high opportunity rather than recognizing each community's mix of assets and shortcomings. Consequently, it fails to capture the multi-dimensional nature of communities without labeling and stigmatizing some communities as 'bad' communities.")

351. *Id.* at 5.

352. METRO. COUNCIL, HOUSING POLICY PLAN 1 (2014) [hereinafter HOUSING POLICY PLAN].

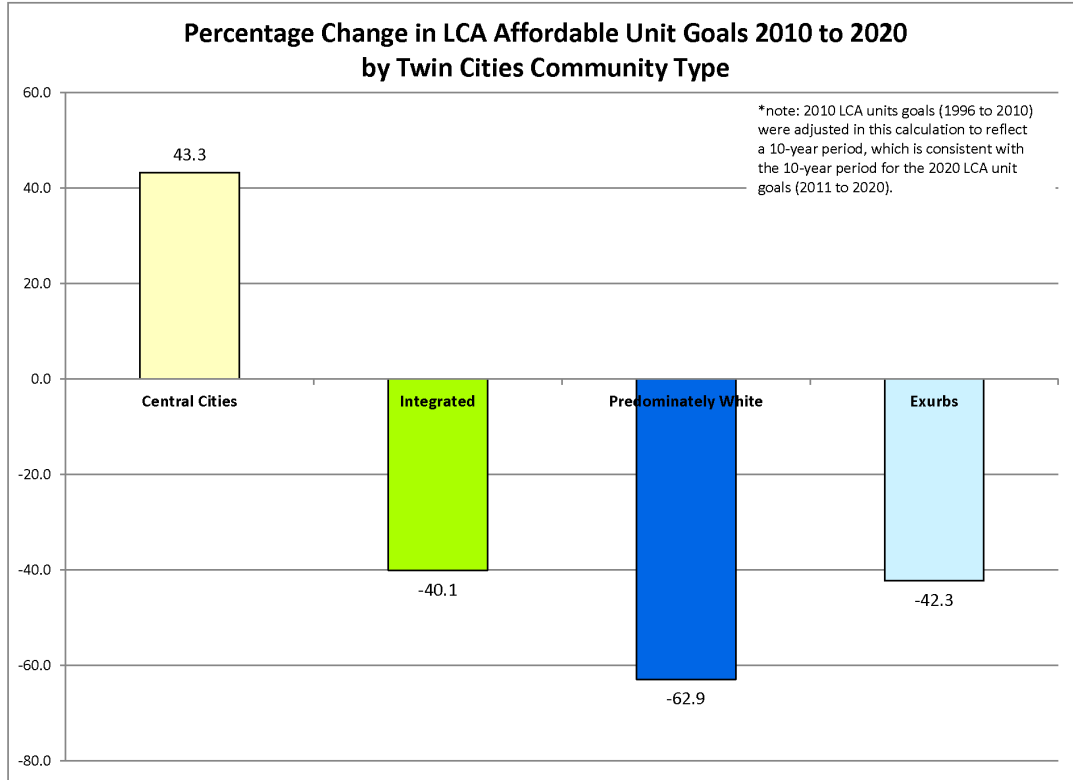
353. *See, e.g., id.* at 136 (discussing the equity assessment).

354. *Id.* at 102–03.

355. *See id.* at 12, 58, 136.

356. *See* METRO. COUNCIL, 2021-2030 ALLOCATION OF AFFORDABLE HOUSING NEED IN THE TWIN CITIES (2014) (listing calculated need).

were the only communities whose LCA benchmarks actually increased in relation to the previous round (see the figure below).³⁵⁷



At every stage of the Met Council's policymaking process, civil rights advocates, including the authors of this article, attempted to draw attention to its missteps. In lengthy comments submitted on drafts of both the Equity Assessment and the Housing Policy Plan (as well as an amendment to the Housing Policy Plan in 2015), commenters drew attention to the reduced role of segregation in Council policy.³⁵⁸ This omission, commenters argued, was both inadvisable as a matter of regional policy, and likely violative of federal civil rights law.³⁵⁹ Nonetheless, these frustrations fell on

357. Calculations performed by the Institute on Metropolitan Opportunity.

358. See INST. ON METRO. OPPORTUNITY, COMMENTS ON THE METRO. COUNCIL PROPOSED AMENDMENTS TO THE HOUSING POLICY PLAN 1 (2015) [hereinafter COMMENTS ON AMENDMENTS].

359. SECOND DRAFT COMMENTS, *supra* note 303, at 7 ("The Met Council ignores

deaf ears and no significant revisions were made as a result of civil rights concerns.³⁶⁰

D. Neo-Segregation in Twin Cities Housing Policy

The abandonment of the Met Council's historic emphasis on coordinated regional planning has resulted in the atomization of housing policy in the Twin Cities region. Individual developers or cities compete for housing resources, often seeking the path of least resistance to acquire and utilize those resources.³⁶¹ Because of the long historical links between affordable development in non-White segregated neighborhoods, and the relative lack of affluent White exclusionary political forces in those areas, the path of least resistance is typically to concentrate affordable housing in those areas, further deepening segregation.³⁶²

In a process that mirrors the charter school system's eventual embrace of segregation, the entities that dominate modern affordable housing development have come to advocate against racial integration.³⁶³ Thus the Twin Cities have developed a complex stakeholder group with direct interests in promoting the continuation of the status quo of residential segregation—in short, housing neo-segregationists.

Early manifestations of this approach appeared in government, as Minneapolis and St. Paul developed policy mechanisms to recapture housing money that was being allocated to suburban areas.³⁶⁴ In 1980, the cities jointly created the Family Housing Fund, a “quasi-public” entity designed to help generate and allocate funding for central city housing projects.³⁶⁵ In its first decade of existence, the Family Housing Fund reported that it had created approximately 10,500 units of affordable housing in the central cities.³⁶⁶

The Family Housing Fund still exists today, helping to produce hundreds of housing units annually, which are more likely to be

the implications of the education data, even though it is clearly part of their duty under the Fair Housing Act and even though all of the FHEA material and webinars state this analysis of school segregation must be part of the FHEA.”); COMMENTS ON AMENDMENTS, *supra* note 358, at 2 (“Federal law requires that the Council’s policies actively promote the racial integration of housing.”).

360. See HOUSING POLICY PLAN, *supra* note 352.

361. See Orfield & Stancil, *supra* note 258, at 23–24.

362. *Id.* at 4.

363. *Id.* at 26–27.

364. *Id.* at 3.

365. *Id.* at 3, 24.

366. *Id.* at 24.

located in segregated census tracts than regional subsidized housing as a whole.³⁶⁷ It has, in the interim, spun off a number of subordinate organizations, such as the Twin Cities Community Land Bank and Twin Cities Housing Development Corporation, which have also at times have been described as quasi-public but now operate more or less independently.³⁶⁸

Efforts to return housing subsidies to the central cities were assisted by the implementation, in 1987, of the Low-Income Housing Tax Credit (LIHTC) system. Prior to LIHTC, most federal housing subsidies were managed by HUD, an agency with a strong statutory civil rights mandate and a civil rights division.³⁶⁹ But in the second half of the 20th century, the amount of federal funding directed to public housing and these other subsidies rapidly declined—ironically, partly as a result of the concern that public housing was being constructed in a segregative fashion.³⁷⁰ In 1986, the Reagan administration created a broad new tax credit for use constructing subsidized housing.³⁷¹ This tax credit is now the federal government's primary contribution to subsidized housing construction, which has effectively privatized the affordable housing industry and placed it under the management of the Internal Revenue Service, a department with no civil rights expertise.³⁷²

The advent of the LIHTC system muddled many of the avenues of control that the Met Council and other agencies had over housing siting. LIHTC projects are initially proposed by a developer—usually private—and agencies primarily exercise control over development with allocation criteria that incentivize certain types of proposals. As a result, subsidized units are more likely to be focused in areas where affordable housing developers are already experienced and active—primarily areas that are low-income and racially segregated.³⁷³ Coordinated regional policy is much more difficult when responsibility for individual projects lies

367. Myron Orfield, Will Stancil, Thomas Luce & Eric Myott, *Response to Poverty-Pimping CDCs: The Search for Dispersal's Next Bogeyman*, 25 HOUS. POL'Y DEBATE 619, 627 (2015).

368. Orfield & Stancil, *supra* note 258, at 26.

369. *Id.* at 27.

370. Doug Gustafson, *Short History of Public Housing in the US (1930's - Present)*, HOMES NOW (Apr. 3, 2018), <https://homesnow.org/short-history-of-public-housing-in-the-us-1930s-present/> [<https://perma.cc/UV3A-SW5E>].

371. CORIANNE PAYTON SCALLY, AMANDA GOLD & NICOLE DUBOIS, URB. INST., *THE LOW-INCOME HOUSING TAX CREDIT: HOW IT WORKS AND WHO IT SERVES* 1 (2018).

372. *See id.*

373. Orfield & Stancil, *supra* note 258, at 3.

with a dense cluster of individual private actors.³⁷⁴ And while housing funding agencies may give preference to projects that are integrative, or at least, not segregative, they will likely face pushback from the developers that are primary clients and may resent any effort to make subsidies harder to obtain.³⁷⁵ When lobbied by civil rights advocates to make their LIHTC allocation policies more integrative, or remove overtly segregative criteria, the Minnesota Housing Agency has responded reluctantly.³⁷⁶

In the Twin Cities, central city development interests went a step further to secure tax credit funding. As pressure to restore subsidies to the cities of Minneapolis and St. Paul mounted, the state legislature implemented a novel “suballocator” system.³⁷⁷ The suballocator system gives Minneapolis and St. Paul independent control of a separate pool of tax credits, while the state housing agency manages tax credit awards for most of the rest of the state, including most Twin Cities suburbs.³⁷⁸ As a result, the cities can protect their tax credits from suburban competition and set independent allocative criteria for that funding.³⁷⁹ Notably, the share of tax credits assigned to the central city was set at the time of the system’s implementation in 1987, and remained unchanged for many years, even while the cities’ share of metropolitan population dropped.³⁸⁰ The allocative system produced by the Council granted 35.6% of metropolitan tax credits to the Minneapolis and St. Paul suballocators, far greater than these cities’ share of the regional population.³⁸¹ This share acts as an effective minimum allocation, but the cities are also eligible for

374. See, e.g., *id.* at 50–51.

375. *Id.* at 31.

376. Myron Orfield, Will Stancil, Thomas Luce & Eric Myott, *High Costs and Segregation in Subsidized Housing Policy*, 25 HOUS. POL’Y DEBATE 574, 592 (2015) [hereinafter Orfield et al., *High Costs*].

377. *Id.* at 577.

378. *Id.* (noting that several suburban counties such as Dakota and Washington Counties and several non-metro cities are also suballocators); see also *id.* at 594 (explaining that suburbs receive relatively small pools of tax credits; the primary divide remains between the two central cities and the state housing agency).

379. *Id.* at 594 (“Another important consideration is the way in which the allocation process shields geographic shares of LIHTC funding from competitive pressure. The suballocator system ensures that the vast majority of central city allocations cannot be diverted to the suburbs, no matter how much cheaper it is to pursue suburban development.”).

380. After the state housing agency and Met Council faced a HUD fair housing complaint in 2015, the suballocator shares were finally adjusted to more closely align with population share. See MINN. HOUS. FIN. AGENCY, AMENDED 2014/2015 HOUSING TAX CREDIT PROGRAM PROCEDURAL MANUAL (2015).

381. Orfield et al., *High Costs*, *supra* note 376, at 597.

additional credits, allocated by the state housing finance agency.³⁸² Between 2006 and 2016, the cities received an average of 45% of the regional allocation annually, and in some years, more than half the regional allocation.³⁸³

The privatization and fragmentation of housing subsidy streams, as well as the new, central-city driven policy consensus on affordable housing development has helped feed the growth of a vast network of nonprofit corporations, housing-oriented financial institutions, public-private collaboratives, housing-centric foundation work, and other small-bore efforts.³⁸⁴

This constellation of housing developers and other housing-related firms has created a welter of problems for Minnesota. Among the most severe of these is the seemingly irrepressible growth of affordable housing costs. There are limited cost controls on affordable housing development, and developers earn fees on a percentage-of-total-cost basis, creating a perverse incentive to drive costs up rather than minimize them. Perhaps relatedly, affordable development costs have skyrocketed. In recent years, it is not unusual for affordable housing projects to exceed \$300,000, \$400,000, and \$500,000 per unit.³⁸⁵ Tellingly, these per-unit costs are actually lower in suburban areas, despite suburban projects tending to include larger units.³⁸⁶ Development costs tend to be higher in central cities, where projects are more likely to be managed by private nonprofit developers and include novel subsidies from many sources.³⁸⁷ Tax credit projects also tend to have higher development costs.³⁸⁸

This lack of oversight and centralized coordination has given root to trends even more troubling than high costs. A recent fad in Minnesota affordable housing is the growth of ultra-high-cost subsidized housing projects where residents are predominantly White.³⁸⁹ Rather suspiciously, given the demographics of their residents, these buildings also tend to bill themselves as “artist housing,” which, under an obscure 2008 federal exemption, allows

382. *Id.*

383. Calculated from data provided by the Minnesota Housing Finance Agency.

384. Orfield et al., *High Costs*, *supra* note 376, at 589.

385. Data provided by Minnesota Housing Finance Agency.

386. Orfield et al., *High Costs*, *supra* note 376, at 584.

387. *Id.*

388. *Id.* at 583–88.

389. INST. ON METRO. OPPORTUNITY, THE RISE OF WHITE-SEGREGATED SUBSIDIZED HOUSING 1 (2016) [hereinafter WHITE-SEGREGATED SUBSIDIZED HOUSING].

building managers to pre-screen residents.³⁹⁰ Often, these buildings are located in up-and-coming neighborhoods and have spectacular amenities, like gyms, yoga studios, and rooftop bars.³⁹¹ One developer, Dominion, has made such projects a major part of its housing portfolio.³⁹² It has produced several of the highest-cost projects in Minnesota, all of which are part of this trend.³⁹³ This included a \$170 million rehab of a historic Pillsbury A-Mill into a soaring housing complex on the Minneapolis riverfront.³⁹⁴ Units in the A-Mill averaged \$665,000 each—mostly for studio or one-bedroom apartments, albeit with fifteen-foot ceilings and sweeping views of downtown Minneapolis.³⁹⁵

The dense web of affordable developers has become a political actor in its own right. The number of entities involved in affordable housing development (the Twin Cities alone contains dozens of community development corporations) and the complexity of their joint efforts (a single housing project can involve the participation of close to a dozen different for-profit and non-profit partners) makes it impossible to fully trace industry influence on housing policy.³⁹⁶ But there is no shortage of examples. The artist screening exemption mentioned above was added by the U.S. Congress after lobbying by a Minnesota-based affordable housing company.³⁹⁷ And they have not hesitated to protect their ability to develop where and when they want. After Dominion came under scrutiny for its work on yet another nine-figure rehab, it sought—and received—a change to Minnesota law which forbade the state housing agency from considering high costs when determining whether to fund the project.³⁹⁸ Dominion is also the highest contributor to a PAC—the Multi Housing Political Action Committee—representing developers in Minnesota state politics.³⁹⁹

390. *Id.*

391. *Id.* at 3.

392. *Id.* at 32.

393. *Id.* at 1.

394. *Id.* at 17.

395. *Id.* at 4.

396. *E.g.*, Orfield et al., *High Costs*, *supra* note 376, at 601–02 (describing the Franklin-Portland project’s complex mix of funding sources).

397. WHITE-SEGREGATED SUBSIDIZED HOUSING, *supra* note 389, at 5.

398. *See, e.g.*, J. Patrick Coolican, *Legislature Pushes Fort Snelling Affordable Housing, at \$600k per Unit*, STAR TRIB. (May 25, 2018), <https://www.startribune.com/legislature-pushes-fort-snellings-affordable-housing-at-600k-per-unit/483632651/> [<https://perma.cc/NP52-87BG>].

399. *Search Contributors*, MINN. CAMPAIGN FIN. BD., <https://cfb.mn.gov/reports/#/contributors/> [<https://perma.cc/NJA7-YLZ3>].

Moreover, the largest entities sometimes partner directly with government bodies like the Met Council to coordinate housing and development choices. For instance, the Met Council and the aforementioned Family Housing Fund participated as leading partners on several local development coalitions, including the ostensibly-public Corridors of Opportunity program (funded by the 2010 Sustainable Communities grant and intended for development along urban transit corridors) and the ostensibly-private Central Corridor Funders' Collaborative (to promote development along the Green Line transit corridor through Minneapolis and St. Paul).⁴⁰⁰ Both initiatives focused heavily on central-city housing development in high-frequency transit areas, ultimately driving greater urban subsidized housing development at the expense of projects in affluent, high-opportunity suburbs.⁴⁰¹ Other frequent partners included the Local Initiatives Support Corporation (or LISC), a national affordable housing financial institution designed to facilitate funding streams to subsidized projects.⁴⁰² LISC is so heavily connected to 1990s Democratic Leadership Conference neo-liberalism that its 20-year board chair is Clinton Secretary of the Treasury Robert Rubin, infamous for his role promoting subprime lending.⁴⁰³ The organization participated in most major Twin Cities affordable housing policymaking of the previous decade, including both of the initiatives above.

Locally, developers have consolidated their efforts behind various entities, such as the Metropolitan Consortium of Community Developers.⁴⁰⁴ They have also funded local nonprofits to support their efforts. For instance, developers have heavily

400. METRO. COUNCIL, CORRIDORS OF OPPORTUNITY, FINAL NARRATIVE REPORT 28 (2014) [hereinafter FINAL NARRATIVE REPORT] (listing Elizabeth Ryan of Family Housing Fund as a partner); *see generally* CENTRAL CORRIDOR FUNDERS COLLABORATIVE, THE FINAL REPORT (2016) (explaining the Metropolitan Council's involvement as the designer/builder of the Green Line).

401. *E.g.*, FINAL NARRATIVE REPORT, *supra* note 400, at 16–17 (describing site specific projects and pre-development projects, most of which are located in the central-city); *see generally* CENTRAL CORRIDOR FUNDERS COLLABORATIVE, *supra* note 400 (discussing affordable housing plans along the Central Corridor, a location in the city-center of the Twin Cities).

402. *See* FINAL NARRATIVE REPORT, *supra* note 400, at 17.

403. *See Board of Directors*, LOCAL INITIATIVES SUPPORT CORP., <https://www.lisc.org/about-us/board-of-directors/> [<https://perma.cc/W2J6-CU4F>].

404. Orfield et al., *High Costs*, *supra* note 376, at 589 (“There is no truly ‘typical’ organization. Instead, the industry is composed of many heterogeneous firms. At present, the Metropolitan Consortium of Community Developers (MCCD), which includes almost all the major players in the Twin Cities housing nonprofit scene, has 49 members, which range from tiny community groups to large nonprofits with yearly revenues in the tens of millions of dollars.”).

supported the Minnesota Housing Partnership. The organization blurs the line between lobbying and policy research, with its mission including “[p]rovid[ing] original research and education resources to generate public support of vital communities and affordable housing,” and “[d]riv[ing] efforts to secure the policies and funding needed at the regional, state, and federal levels to advance local housing and community development.”⁴⁰⁵ The organization’s board is primarily composed of the presidents of development companies, but also includes the housing and development directors from Minneapolis and St. Paul.⁴⁰⁶ For many years, the president of the A-Mill developer Dominion served as chair of this organization.⁴⁰⁷ The partnership’s research never touches core civil rights questions like segregation in housing but reliably emphasizes the need for more funding to combat shortages and gentrification.⁴⁰⁸

This nonprofit industrial complex has helped spur the rise of a coterie of integration-skeptical academics, advocates, and attorneys. For example, a frequent partner of major Twin Cities housing nonprofits is the prominent Center for Urban and Regional Affairs at the University of Minnesota. The director of that institute, Edward Goetz, has positioned himself as a strong critic of housing integration policy for decades.⁴⁰⁹ Goetz has consistently maintained that the Fair Housing Act was not intended to include an integration mandate and that “the language of the act itself is unambiguously focused on eliminating private discrimination in the private housing market.”⁴¹⁰ In recent years, he has published a book-length refutation of the idea that integration is a core aim of the Fair Housing Act or should be a major goal of housing policy.⁴¹¹ His claims about the Act, in addition to contradicting every

405. See *Who We Are*, MINN. HOUS. P'SHIP, <https://www.mhponline.org/about> [<https://perma.cc/PWB9-DGZR>] [hereinafter *Who We Are*].

406. See *Board*, MINN. HOUS. P'SHIP, <http://www.mhponline.org/about/board> [<https://perma.cc/7VTS-49ZQ>] [hereinafter *Minn. Hous. P'ship Board*].

407. See *id.*

408. See, e.g., MINN. HOUS. P'SHIP, *SOLD OUT* (2016) (emphasizing increasing sales of rental property in the Twin Cities driving up rents).

409. See, e.g., Edward Goetz, *Poverty-Pimping CDCs: The Search for Dispersal's Next Bogeyman*, 25 HOUS. POL'Y DEBATE 608, 610 (2015) (“Given these counter claims on housing policy, is there any evidence for the proposition that integration is a privileged objective of federal housing policy? Certainly not in the Fair Housing Act itself.”).

410. EDWARD GOETZ, *THE ONE-WAY STREET OF INTEGRATION: FAIR HOUSING AND THE PURSUIT OF RACIAL JUSTICE* 96 (2018).

411. See *id.*

Supreme Court and Circuit Court interpretation to date, have been directly refuted by Walter Mondale, a co-author of the Act.⁴¹²

This network of experts has played an important role in establishing a theoretical and academic framework for many of the neo-segregationist policies adopted by Minnesota governments and agencies. Most national research has shown clear benefits of integration in housing and schools, like the 2015 study by Harvard professor Raj Chetty that unambiguously showed that moving to affluent areas produced adult income benefits for low-income children.⁴¹³ But Minnesota agencies have typically preferred to rely on local experts and advocates instead, many of whom could be relied upon to produce dissenting, integration-skeptical work.

For example, in the wake of a civil rights lawsuit requiring the Minneapolis Public Housing Authority to stop segregatively concentrating its public housing units in heavily-Black North Minneapolis, the Family Housing Fund and the Minnesota state housing agency hired Goetz to produce a lengthy evaluative report.⁴¹⁴ Unsurprisingly, the resulting document suggested the lawsuit was ultimately unhelpful and argued that preserving community links was more important than attacking residential segregation.⁴¹⁵ In similar fashion, as a component of its 2010 Sustainable Communities grant, the Met Council also hired a team of Minnesota-based private and academic consultants to conduct evaluation.⁴¹⁶ That team included Goetz.⁴¹⁷ It also included Jack Cann, a housing attorney who frequently represented subsidized developers, and has opposed policies that require integrative placement of affordable units, describing Met Council fair-share

412. Walter F. Mondale, *The Civil Rights Law We Ignored*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/opinion/walter-mondale-fair-housing-act.html> [<https://perma.cc/9DJJA-ALTG>] (“At times, critics suggest the law’s integration aims should be sidelined in favor of colorblind enforcement measures that stamp out racial discrimination but do not serve the larger purpose of defeating systemic segregation. To the law’s drafters, these ideas were not in conflict.”).

413. See Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016).

414. See EDWARD G. GOETZ, CTR. FOR URB. AND REG’L AFF., U. OF MINN., DECONCENTRATING POVERTY IN MINNEAPOLIS: HOLLMAN V. CISNEROS ix (2002) (thanking the Family Housing Fund and the Minnesota Housing Finance Agency for funding the research).

415. *Id.* at 16–21.

416. U.S. DEPT OF HOUS. & URB. DEV., FY2010 SUSTAINABLE COMMUNITIES REGIONAL PLANNING GRANT PROGRAM – GRANTEES 1 (2010).

417. Edward G. Goetz, *Curriculum Vitae*, HUMPHREY SCH. PUB. AFFS., <https://www.hhh.umn.edu/sites/hhh.umn.edu/files/2020-08/Goetz,%20Edward%20CV.pdf> [<https://perma.cc/NT39-YMT8>].

policies as “dispersal” as early as 1973.⁴¹⁸ Another member of Goetz’s Center sits on the board of the aforementioned Minnesota Housing Partnership.⁴¹⁹

Although the Met Council remains the regional governmental entity primarily responsible for civil rights backsliding, other local governments, particularly in the central cities of Minneapolis and St. Paul, have undergone similar reversions under pressure from development interests. For example, in 2012, Minneapolis adopted a Consolidated Plan that weakened a previous bar on the use of HUD HOME funds to build affordable housing in racially identifiable neighborhoods.⁴²⁰

Declining concern about segregation is also evident in other government processes. Jurisdictions receiving HUD funding also are required to submit a five-year report called an Analysis of Impediments to Fair Housing (AI).⁴²¹ Similar to the Met Council equity assessment discussed above, these reports require jurisdictions to identify demographic patterns, as well as obstacles to fair housing opportunity, including patterns of integration and segregation.⁴²² In the Twin Cities region, the 13 HUD entitlement jurisdictions, which include Minneapolis, St. Paul, several large suburbs, and several counties, have coordinated their AI process, releasing a single “regional” AI that covers all communities.⁴²³

Two such AIs have been completed in the past decade: one in 2020 and one in 2014.⁴²⁴ The latter entirely ignored the question of how racial segregation plays out in Minnesota.⁴²⁵ Although federal policy requires AI jurisdictions to identify public policies that have created fair housing obstacles, both AIs spared the jurisdictions themselves from critique and focused heavily on private-market factors that obstructed housing opportunity.⁴²⁶ Indeed, the 2014 AI avoided the word segregation altogether, except two brief summaries of third-party reports, a web survey response, and once

418. See *Low Income Housing Dispersal*, MINNEAPOLIS STAR, Jan. 2, 1973.

419. *Minn. Hous. P’ship Board*, *supra* note 406 (listing Dr. Brittany Lewis, Senior Research Associate of the Center for Urban and Regional Affairs, as a board member).

420. See U.S. DEP’T OF HOUS. & URB. DEV., THE FY 2012 MINNEAPOLIS CONSOLIDATED PLAN FOR HOUSING AND COMMUNITY DEVELOPMENT (2012–2013).

421. *Id.* at 83.

422. WESTERN ECON. SERV., LLC, FAIR HOUS. IMPLEMENTATION COUNCIL, 2009 ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE: FINAL REPORT 1 (2009).

423. See *id.* at 11; HOUSINGLINK, FAIR HOUSING IMPLEMENTATION COUNCIL, 2014 ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE: TWIN CITIES REGION 6 (2015).

424. WESTERN ECON. SERV., LLC, *supra* note 422; HOUSINGLINK, *supra* note 423.

425. See HOUSINGLINK, *supra* note 423.

426. *Id.* at 43.

in the preface.⁴²⁷ Although comments were submitted identifying these and other shortcomings, local leaders remained resistant to changing the documents.⁴²⁸

The growth of neo-segregationist thinking in Twin Cities housing politics reached a head in the mid-2010s. In 2014 and 2015, several Minneapolis neighborhood groups, a housing civil rights group, and three regional suburbs filed two HUD fair housing complaints.⁴²⁹ The first complaint was filed against the Met Council and the state housing agency, citing their abandonment of previous housing integration policies, including the fair-share policy.⁴³⁰ The second complaint was filed against the central cities of Minneapolis and St. Paul, citing their longstanding practice of disproportionately situating new affordable development in low-income areas.⁴³¹

The complaints quickly became a flashpoint for housing politics. Exhibiting their deep skepticism of housing integration, local housing nonprofits, coordinated through several umbrella entities (most notably the Metropolitan Consortium of Community Developers), quickly opposed both complaints.⁴³² Developers organized letter-writing campaigns, arguing that the complaints would remove much-needed resources from poor areas, and attempted to intervene directly with HUD.⁴³³

427. *See id.* at 6, 73, 76, 121.

428. *See, e.g.*, INST. ON METRO. OPPORTUNITY, COMMENTS ON THE DRAFT FHIC 2014 ANALYSIS OF IMPEDIMENTS FOR THE TWIN CITIES REGION (2015).

429. *See* Sasha Aslanian, *Twin Cities Suburbs File Housing Complaint Against State*, MPR NEWS (Nov. 10, 2014), <https://www.mprnews.org/story/2014/11/10/Housing-complaining> [<https://perma.cc/PCQ5-WLT8>]; Peter Callaghan, *Settlement Could Alter How Affordable Housing Is Built Throughout Twin Cities Metro*, MINNPOST (May 13, 2016), <https://www.minnpost.com/politics-policy/2016/05/settlement-could-alter-how-affordable-housing-built-throughout-twin-cities-m/> [<https://perma.cc/XFE2-7YZ7>].

430. *See MICAH Fair Housing Complaints to HUD*, METRO. INTERFAITH COAL. ON AFFORDABLE HOUS., <https://www.micah.org/hud-complaint> [<https://perma.cc/9873-TCKS>] [hereinafter *MICAH Complaints*].

431. *See id.*; *see also* Peter Callaghan, *Civil Rights Complaint Seeks to Stop Cities from Concentrating Low-Income Housing in High-Poverty Neighborhoods*, MINNPOST (Apr. 14, 2015), <https://www.minnpost.com/politics-policy/2015/04/civil-rights-complaint-seeks-stop-cities-concentrating-low-income-housing-hi/> [<https://perma.cc/6E7W-RESY>].

432. This opposition was primarily registered in materials distributed through the community. For example, one letter authored by the Consortium, on file with authors, claimed that the complaints were “[t]hwarting Business and Housing Opportunities” and focused heavily on how they would prevent additional housing funding in central city neighborhoods.

433. At a community meeting, the developer Urban Homeworks distributed postcards opposing the complaint, pre-addressed to HUD. A copy of this postcard is on file with the authors.

The second complaint, filed against Minneapolis and St. Paul, reached an ambiguous conclusion in 2016.⁴³⁴ Both cities entered into Voluntary Compliance Agreements with HUD, agreeing to take certain measures to improve their housing policies.⁴³⁵ Chief among these was a revision of the 2016 Analysis of Impediments. In what represented a tacit admission of the deficiencies of the 2016 submission, the revised document would be constructed by a Fair Housing Advisory Committee, and was required to include a renewed focus on integration, segregation, and public policies contributing to fair housing impediments.⁴³⁶

However, the Fair Housing Advisory Committee process envisioned in the compliance agreements was complex and contentious. The committees included both the original complainants, as well as the city respondents.⁴³⁷ But after substantial lobbying by housing developers, a contingent of developer-friendly nonprofits—as well as several subsidized housing developers—were also awarded seats on the committee.⁴³⁸ These nonprofit members argued vociferously against inclusion of any material that would suggest that integration was a major objective of housing policy, and suggested that integration be defined more nebulously to include areas that were non-White segregated.⁴³⁹ The developers and nonprofit also argued that the

434. See *MICAH Complaints*, *supra* note 430 (“HUD announced agreements with the City of Minneapolis and the City of St. Paul to further housing choice and neighborhood opportunities in the two cities and the surrounding region.”).

435. See Voluntary Compliance Agreement Between the U.S. Dep’t of Hous. and Urb. Dev., the City of Minneapolis, the Metro. Interfaith Council on Affordable Hous., the Webber-Camden Neighborhood Org., the Whittier All., and the Folwell Neighborhood Ass’n (May 16, 2016).

436. *Id.*

437. *Id.* at 5.

438. *Id.*

439. Minutes for the Fair Housing Advisory Committee meetings, on file with the authors, demonstrate the persistent efforts of developer-affiliated groups to steer the conversation away from the mandated subject of integration. Taken together, they form a useful illustration of how neo-segregationist organizations can take advantage of consensus-driven processes to protect their material interests by invoking equity and broadmindedness.

- In a June 29, 2016 meeting, a representative from community developer ACER spoke up to try to reframe the discussion away from segregation and integration.
- In a July 27, 2016 meeting, the lobbyist for development-oriented groups tries to argue against the notion of affordable housing concentration, arguing that too much housing cannot be concentrated in a neighborhood.
- In a September 28, 2016 meeting, the ACER representative spoke up again to criticize the use of the term integration.
- In the same meeting, the lobbyist speaks up to say he has a fundamental disagreement with other people at the table about where investment should

focus of the revised AI should be gentrification and housing displacement, phenomena which conveniently served as a justification for the preexisting policy of siting subsidized housing in low-income areas.

As a result of these efforts, the final revised AI represented both a substantial improvement over the previous submission, and a policy mishmash that envisioned relatively minor changes.⁴⁴⁰ Most of the recommendations in the final revised AI were policies already adopted, or already under consideration, in the central cities. Meanwhile, the process was completed in the early months of the Trump administration, at a time when federal fair housing enforcement was collapsing.⁴⁴¹ As a result, there has been, by all appearances, little follow-up oversight from federal agencies to ensure the cities are meeting even their small obligations.

The other HUD complaint, against the Met Council and state housing agency, was never resolved. Little progress was made after administrations changed in 2017. It remains to be seen how the matter will conclude.

be spent.

- In the same meeting, a representative of a community developer based in the low-income Frogtown area speaks up to argue in favor of spending more housing funds in concentrated neighborhoods.
- In an October 26, 2016 meeting, the lobbyist speaks about the importance of focusing on gentrification and displacement.
- In a December 7, 2016 meeting, the lobbyist and the representative for the Minneapolis community development department, push back against the inclusion of research on segregation in a draft Analysis of Impediments.
- In a February 8, 2016 meeting, the lobbyist speaks up multiple times to insist that gentrification and displacement receive their own coverage in the final Analysis of Impediments.
- Finally, in the March 15, 2016 meeting, which served as the capstone discussion on the second draft Analysis of Impediments, the representative for the Minneapolis community development department talks about the need to focus development in highly concentrated areas where residents are cost-burdened.
- In the same meeting, the ACER representative said that she would like more emphasis on gentrification and displacement.
- In the same meeting, the lobbyist says that his comments have tried to move the group away from “segregation as the problem, and more so as the symptom.” He expresses his concern about language that suggests the solution is to “move renters around, that is not getting to the root of the problem.” The minutes note he “pushed back against the term desegregation plan, noting it sounds like a displacement plan.”

440. See MOSAIC CMTY. PLAN., FAIR HOUS. IMPLEMENTATION COUNCIL, ADDENDUM TO THE TWIN CITIES REGIONAL ANALYSIS OF IMPEDIMENTS (2017).

441. See, e.g., Eric Roper, *Federal Rule on Housing Integration Never Got Off the Ground*, STAR TRIB. (Oct. 3, 2020), <https://www.startribune.com/federal-rule-on-housing-integration-never-got-off-the-ground/572627311/> [<https://perma.cc/XW2Y-WUX6>].

Conclusion

In much of the academic world, a consensus exists around the positive benefits of integration, akin to the consensus around the causes and harms of climate change. Despite this, neo-segregationist views have spent decades accumulating support in the ranks of Minnesota institutions. This includes organizations with a direct interest in maintaining the segregated status quo, like affordable housing developers and charters schools. But it has also meant the collection of organizations that support, fund, and promote those entities. Minnesota's largest philanthropies have flirted with neo-segregationism, absorbing figures from the government and nonprofit world who promote these ideas. For example, Lee Sheehy, the Deputy Attorney General who oversaw the gutting of the Minnesota school desegregation rule in 2019 and then served as the Met Council Regional Administrator, migrated to a position as the McKnight Foundation's Director of Regions and Communities, where he spent over a decade heavily funding community developers.⁴⁴² Sheehy even briefly served as interim president of the McKnight Foundation.⁴⁴³

Neo-segregationism's greatest political asset is how it depicts the status quo as desirable and change as reckless. This bias towards the status quo ensures that proponents of neo-segregationist policy can draw support from monied interests for whom major reform would be financially and politically disruptive. It also ensures that neo-segregationism can find easy support from political moderates of both parties.⁴⁴⁴ Charter schools, for instance, were developed with the support of both center-leaning business-affiliated Republicans, and center-leaning, business-oriented Democrats.⁴⁴⁵ Often, the campaign to promote charters, and defend the segregation they create, has become inextricably tangled with anti-union efforts from business interests.⁴⁴⁶

442. The Regions and Communities program allocated \$700,000 to the integration-skeptical Center for Urban and Regional Affairs, a project of the University of Minnesota Foundation, to conduct "strategic collaboration" with other community programs as recently as 2016. *Grant Search*, MCKNIGHT FOUND., <https://www.mcknight.org/grants/search-our-grants/> [https://perma.cc/7SXQ-EDUC].

443. *McKnight Accelerates Economic Mobility in First Slate of Vibrant & Equitable Communities Grants*, MCKNIGHT FOUND. (Mar. 2021), <https://www.mcknight.org/news-ideas/mcknight-accelerates-economic-mobility-in-first-slate-of-vibrant-equitable-communities-grants/> [https://perma.cc/VV4G-D2G3].

444. See JUNGE, *supra* note 118.

445. Cohen, *supra* note 114 ("Although conservatives led the way in for pushing education reform in the 1980s, centrist liberals jumped on board in the early 1990s.")

446. *Id.* ("Most charters are more segregated than traditional public schools, are

While the core strength of neo-segregation comes from how it protects the financial self-interest of the powerful, it has also made headway in academia. There is a cottage industry of think tanks and research organizations dedicated to supporting and assisting the housing industry and private education reformers, often directly funded by these industries.⁴⁴⁷ These institutions reliably produce research and analysis that conform neatly to the policy objectives of their benefactors—highlighting the benefits of affordable housing, lauding school choice as instrumental to closing achievement gaps, and attacking alternative interpretations of the evidence.⁴⁴⁸

By design or otherwise, these institutions find themselves frequently in conflict with civil rights organizations, because a focus on segregation and racial isolation inevitably undercuts the assertion that technocratic, well-funded policy tinkering can eliminate racial disparities that have been growing since the 1990s.⁴⁴⁹

This conflict threatens to damage hard-fought civil rights victories, especially in the legal realm. In order to protect funding streams and the status quo, neo-segregationists today have adopted legal arguments first advanced by right-wing groups like the Pacific Legal Foundation. They have actively sought to limit *Brown v. Board of Education* and its progeny, to obstruct the ability of cities and schools to voluntarily integrate, and to undermine core elements of the Fair Housing Act—most especially, its integration imperative.⁴⁵⁰

In Minnesota these efforts are especially galling. Minnesota is the birthplace of a remarkable amount of American civil rights thinking—a history that should be celebrated. With the support of these allies, neo-segregationists are instead erasing and rewriting this history, contributing to greater racial inequality. As the civil rights era fades from living memory, it would be a travesty to allow

non-union, and when charter educators do mount union campaigns, they almost always face tremendous opposition.”).

447. See, e.g., *id.* (describing the Democratic Leadership Council’s Progressive Policy Institute); *Who We Are*, *supra* note 405, at 28.

448. See Goetz, *supra* note 414.

449. MINN. EMP’T AND ECON. DEV., DEED LAB. MKT. INFO. OFF., MINNESOTA DISPARITIES BY RACE REPORT (2020); see generally Greg Rosalsky, *Minneapolis Ranks Near Bottom for Racial Equality*, NPR NEWS: PLANET MONEY (June 2, 2020), <https://www.npr.org/sections/money/2020/06/02/867195676/minneapolis-ranks-near-the-bottom-for-racial-equality> [<https://perma.cc/DP47-F47D>] (expositing Minnesota’s vast employment and wealth gap for White and Black residents).

450. See, e.g., 1998 SONAR, *supra* note 96, at B1 (downplaying the importance of *Brown* deliberately).

segregation to prevail once again. Those who would have the United States divided should not be permitted to accomplish through policy subterfuge what they could not accomplish through open revolt or massive resistance. Minnesota should reclaim its civil rights heritage, reject segregation once and for all, and resume the march towards greater equality and integration.